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SCHOOL OF LAW

GIFT OF

A TREATISE

ON THE

LAW OF PARTNERSHIP.

BY

THE RIGHT HONORABLE

SIR NATHANIEL LINDLEY, KNT.,

ONE OF THE LORDS JUSTICES OF HER MAJESTY'S COURT OF APPEAL,

ASSISTED BY WILLIAM C. GULL, M. A., OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW, VINERIAN SCHOLAR IN THE UNIVERSITY OF OXFORD, 1883; AND WALTER B. LINDLEY, M. A., OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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A CARD.

The English publishers of "Lindley on Partnership" recommend to the American bar the American edition, published by F. D. Linn & Co., of Jersey City. This edition is published from advance sheets of the fifth English edition, purchased from us, and is the only edition printed or to be printed in the United States from the English advance sheets, or with authority from us.

W. MAXWELL & SON.

8 Bell Yard, Temple Bar London, May 8th, 1888.

PREFACE

TO AMERICAN EDITION.

In the selection and arrangement of the American notes, the aim of the annotator has been two-fold: *First.* To ascertain and state not only the true result of the authorities, but, upon important topics, to make extensive extracts from the opinions of eminent judges and text-writers, thus showing both the rules laid down and the reasoning upon which they are founded. *Second.* To so arrange and classify the notes, by means of catch-words or captions in bold type (following closely the classification adopted by the eminent author of the text), as to produce in the notes not merely a rambling mass of digest clippings, but a *second treatise,* exhibiting the American Law of Partnership in close juxtaposition with the English law as given in the text.

To further assure this end, an independent index has been carefully prepared for the notes, and the annotator feels well assured that with its aid the American law upon any question of partnership can be readily and definitely ascertained.

S. R.

New York, May, 1888.

PREFACE.

The present volume is the fifth edition of a portion of the author's former "Treatise on the Law of Partnership, including its application to Companies." When that treatise was first published, viz., in 1860, the Law of Companies was being developed by legislative enactment and judicial decision out of the Law of Partnership; and it appeared to the author desirable to trace that development, and to endeavor, in one treatise, to investigate the Law of Partnership and to determine the extent to which its principles were applicable to companies. But in the course of the last quarter of a century Company Law has been developed to such an extent as to justify, if not to require, separate treatment; and with a view to convenience and expense, advantage has been taken of the opportunity afforded by the demand for a fifth edition, to divide the former treatise into two parts, each of which shall be complete without the other, viz., the Law of Partnership proper, and the Law of Companies, in so far as it has any connection with the former. This volume is devoted to the first of these parts, viz., the Law of Partnership proper. The volume relating to companies is in course of preparation, and will be published shortly.

In arrangement, the order of treatment previously adopted has been retained, with the exceptions that the causes of dissolution, the right to retire, and the right to expel, have been transferred to the chapter on Dissolution, in Book IV. This modification will, it is hoped, be considered an improvement.

Great pains have been taken to render this edition deserving of the favorable reception accorded to those which have preceded it. Several very important cases, and especially Kendall *v.* Hamilton, Scaif *v.* Jardine, and the Yorkshire Banking Company *v.* Beatson, have been decided since the publication of the last edition. There has also appeared the Digest of the Law of Partnership, by Mr. Frederick Pollock, which is full of observations of the greatest value; and the third edition of which the author has constantly consulted. In the Appendix to it will be found the draft of a bill to consolidate and amend the Law of Partnership. It is much to be regretted that this branch of the law should not be put into shape and codified by legislative authority. Mr. Pol-

lock's remarks on this subject, in the Preface to the third and fourth editions of the Digest, deserve the serious attention of the legislature. But this is not the place to enlarge on the many advantages which would accrue to this country if its laws were gradually revised on the model of the Indian codes.

The whole of the present treatise has once more been carefully revised throughout. Whatever is obsolete has been omitted, or, if retained as being still useful, has been printed in small type. The author's increased experience has suggested additions and alterations, and many portions have been re-written and adapted to the most recent decisions.

Notwithstanding, however, the labor bestowed upon the work, and the anxiety of the author to render it a trustworthy guide to the subject to which it relates, the multiplicity and difficulty of the questions with which he has had to deal are such, that he dare not venture to hope that he has always avoided error, or that his work is free from serious faults; and although it has engaged his unremitting attention for more than thirty years, he is painfully aware that it is even now but an imperfect production.

The author's thanks are due to Mr. W. C. Gull and Mr. W. B. Lindley, for their assistance in revising the sheets, and to the former gentleman also for his aid in preparing materials, in examining American and Irish reports and authorities on doubtful points, and for the preparation of the indexes.

Royal Courts of Justice, 1st March, 1888.

ANALYSIS OF CONTENTS.

[Reference is to Star (*) paging.]

	*Page
PREFACE	v
ENGLISH AUTHORITIES CITED	xxiii
AMERICAN AUTHORITIES CITED.	
ADDITIONS AND CORRECTIONS.	
INTRODUCTORY	1
BOOK I.—OF CONTRACTS OF PARTNERSHIP	7
BOOK II.—OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS REGARDS NON-PARTNERS	124
BOOK III.—OF THE RIGHTS AND OBLIGATIONS OF THE MEMBERS OF PARTNERSHIPS BETWEEN THEMSELVES	301
BOOK IV.—OF THE DISSOLUTION AND WINDING-UP OF PARTNERSHIPS	570
INDEX TO TEXT	1207
INDEX TO AMERICAN NOTES	1307

INTRODUCTORY.

1. Meaning of the word partnership 1
2. Distinction between partnerships, corporations, and companies . . 4

BOOK I.

OF CONTRACTS OF PARTNERSHIP.

CHAP. I.—THE NATURE OF THE CONTRACT DETERMINED 7

Preliminary observations 7

SECT. 1.—Of true partnerships 10

1. Partnership is the result of an agreement to share profits and losses 10

*Page

2. Partnership is *prima facie* the result of an agreement to share profits although nothing may be said about losses, and although there may be no common stock 12
3. Partnership is *prima facie* the result of an agreement to share profits although community of loss is stipulated against . . . 15
4. Partnership is not the result of an agreement to share gross returns 17
5. Partnership is not the result of an agreement which is not concluded 19
6. Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues 20
Application of this principle to
Ordinary partnerships 20
Promoters of companies. . . . 23

SECT. 2.—Of *quasi*-partnerships 25
1. By sharing profits 25
Of the doctrine that persons who share profits are liable for each other's acts as if they were partners
1. State of the law anterior to *Cox v. Hickman*. 26
2. Modifications introduced by *Cox v. Hickman*. 30
3. The act of 28 & 29 Vict. c. 86 . . . 35
2. By holding oneself out as a partner 40
SECT. 3.—Of sub-partnerships 48
SECT. 4.—Of general and particular partnerships 49
SECT. 5.—Of clubs and societies not having gain for their object . 50
SECT. 6.—Of co-ownership as distinguished from co-partnership . 51
Note on the remedies between co-owners . . 57

CHAP. II.—OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP . 63
Of the return of premiums 64

CHAP. III.—OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP 70
SECT. 1.—Of their number 70
SECT. 2.—Of their capacity. 71
1. Aliens 72
2. Felons and outlaws 73
3. Infants 74

*Page

4. Lunatics 76
5. Married Women 77
6. Corporations and companies 78

CHAP. IV.—Of the Evidence by which a Partnership or Quasi-Partnership may be proved 80
The Statute of Frauds 80
The fact to be proved 83
The means of proving it 84

CHAP. V.—Of Illegal Partnerships 91

Sect. 1.—What partnerships are illegal:—
In general 91
By particular statutes, and herein of
Bankers 95
Brokers 97
Insurers 97
Medical practitioners 98
Newspaper proprietors 99
Patentees 99
Pawnbrokers 99
Solicitors 100
Theatrical managers, &c. 101
Unincorporated Joint-Stock companies with transferable shares 101
Unregistered partnerships 101
Sect. 2.—Consequences of illegality 102
Especially as regards actions between the partners . 104

CHAP. VI.—Of the General Nature of a Partnership . . . 110

Sect. 1.—Of the mercantile and legal notion of a firm . . . 110

Sect. 2.—Consequences of the non-recognition of the firm as distinguished from the persons composing it . . . 112
1. Generally as regards its name 112
2. In legal proceedings 115
3. Partnership disabilites 116
4. As regards sureties and securities, and in particular of the effect produced on them by a change in the firm 117

CHAP. VII.—Of the Duration of Contracts of Partnership . . 121
Of partnerships at will and for a term 121
[As to causes of dissolution, see Bk. IV.]

BOOK II.

ON THE RIGHTS AND OBLIGATIONS OF PARTNERS AS REGARDS NON-PARTNERS.

*Page

CHAP. I.—Of the Liabilities of Partners for the Acts of each other 124

Sect. 1.—General principles of agency as applied to ordinary partnerships 124

Sect. 2. Liability of partners in respect of acts which are neither torts nor frauds 128

and herein of the implied powers of partners in matters relating to

1. Accounts 128
2. Admissions 128
3. Agents 129
4. Arbitration 129
5. Banking accounts 129
6. Bills of exchange and promissory notes . 129
7. Bonds 131
8. Borrowing money 131
9. Cheques 133
10. Contracts 134
11. Debts 134
12. Deeds 136
13. Distress 137
14. Extension of business 137
15. Guarantees 138
16. Insurances 139
17. Interest 139
18. Judicial proceedings 139
19. Leases 139
20. Mortgages and pledges 139
21. Notice 141
22. Payments 143
23. Penalties 143
24. Purchases 144
25. Receipts 145
26. Releases 145
27. Representations 146
28. Sales 146
29. Servants 147
30. Ships 147

*Page

Sect. 3.—Liability of partners in respect of torts and frauds . . 147
1. Torts 149
2. Frauds 150
Liability of partnerships for the misapplication of money by their members 150
Liability of partnerships for the false representations of their members 162

Sect. 4.—Liability of partners in respect of acts which are unauthorised, and are known so to be 167

Sect. 5.—Effect of the form of a contract on the liability of partners in respect of contracts not entered into on behalf of the firm, or not so in proper form 176
1. Contracts under seal 177
2. Ordinary contracts not under seal . . . 177
3. Bills of exchange and promissory notes . . 180
Bills in the name of the firm 180
not in the name of the firm . . . 184
Promissory notes 187

Sect. 6.—Liability of partnerships in respect of contracts not binding on them, but of which they have had the benefit . 189

CHAP. II.—Of the Nature, Extent, and Duration of the Liability of Partners to Creditors 192

Sect. 1.—Nature of the liability, and herein of joint and several liability
1. As regards contracts 192
2. As regards torts and frauds 198

Sect. 2.—Extent of the liability 200

Sect. 3.—Duration of the liability 201
1. Commencement of liability 201
liability of firm for acts preceding its formation . 202
liability of incoming partners for debts contracted before they join the firm . . . 205
2. Termination of liability 210
A. As to future acts 210
1. without notice of dissolution . . . 211
Death 211
Bankruptcy 212
Retirement of dormant partners . 213
2. by notice of dissolution or retirement. . 213
the effect of such notice . . . 215

*Page

when there is a continued holding out notwithstanding the notice 216
with reference to the doctrine that a partnership, though dissolved, subsists so far as is necessary for the winding-up of its affairs . 217
what amounts to notice . . . 221
and herein of the distinction between old customers and other people 221
B. As to past acts 223
and especially by
1. Payment 225
of the appropriation of payments . . . 226
where there is a single current account . . 228
where there are several distinct accounts . 231
2. Release 237
3. Substitution of debtors and securities . . 239
(*a*) by agreement 239
A. Where a retired partner has not been discharged
a. no new partner having been introduced 242
b. although a new partner has been introduced 245
B. Where a retired partner has been discharged 247
Discharge of the estate of a deceased partner 249
(*b*) by merger and judgment 254
and herein of the effect of taking fresh securities for an old debt . . 254
4. Lapse of time and the Statutes of Limitation. 257

CHAP. III.—Of Actions between Partners and Non-Partners.

Sect. 1.—Of actions by and against partners 264
1. General observations 264
2. Where no change in the firm has occurred since the right accrued 273
A. Actions in respect of legal rights . . . 273
(*a*) Actions by the firm 273
Actions *ex contractu* 273
Actions *ex delicto* 278

*Page

(*b*) Actions against the firm 280
Actions *ex contractu* 280
Actions *ex delicto* 283
B. Actions in respect of equitable rights . . 283
3. Where a change in the firm has occurred since the right accrued 284

Sect. 2.—Of set-off 290

Sect. 3.—Of execution against partners for the debts of the firm . . 298

BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF THE MEMBERS OF PARTNERSHIPS BETWEEN THEMSELVES.

CHAP. I.—Of the right to take Part in the Management of the Affairs of the Firm 301

CHAP. II.—Of the General Duties of Partners to observe Good Faith 303

Sect. 1.—Preliminary remarks 303

Sect. 2.—Of the obligation of partners not to benefit themselves at the expense of their co-partners 305

Sect. 3.—Of the powers of a majority of partners 313
1. in matters arising in the ordinary course of business 314
2. in matters involving a change in the nature of the business 315

CHAP. III.—Of the Capitals of Partnerships 320

CHAP. IV.—Of Joint and Separate Property 322

Sect. 1.—Of joint estate 323

Sect. 2.—Of separate estate 327

Sect. 3.—Of the conversion of joint estate into separate, and *vice versa* 334

CHAP. V.—Of Shares in Partnerships 339

Sect. 1.—Of the nature of a share and the rules which govern its devolution in case of death 339

*Page

of the doctrine of non-survivorship between partners . 340
of the doctrine that shares are personal estate . . . 343

Sect. 2.—Of the amount of each partner's share 348
the presumption in favor of equality 348

Sect. 3.—Of the lien which each partner has on the property of the firm, and on the shares of his co-partners . . . 351

Sect. 4.—Of the mode in which a share is taken in execution for the separate debts of its owner 356
1. The duty of the sheriff 356
2. The position of the purchaser from the sheriff . . 358
3. The position of the execution debtor 359
4. Modifications introduced by the Judicature Acts . . 361

Sect. 5.—Of the transfer of shares 363
[N.B.—As to the relinquishment and forfeiture of shares and as to the right to retire and expel, see *infra*, Bk. IV., Chap. I., § 1.]

CHAP. VI.—Of Contribution and Indemnity 367

Sect. 1.—General observations 368
1. Foundation of the right to contribution 368
2. Of the right of agents and trustees to indemnity from their principals and *cestuis que trustent* 369
3. Of some former differences between contribution at law and in equity 374
4. Of contribution between wrongdoers 377

Sect. 2.—Of compensation for trouble 380

Sect. 3.—Of outlays and advances 381

Sect. 4.—Of debts, liabilities, and losses 385

Sect. 5.—Of interest 389

CHAP. VII.—Of the Division of Profits 393

CHAP. VIII.—Of the Accounts of Partnerships 396

Sect. 1.—Of the mode of keeping partnership accounts . . . 396

Sect. 2.—Of the duty to keep and the right to inspect them . . 404

CHAP. IX.—Of Partnership Articles 406

Sect. 1.—General observations 406
1. Partnership articles are not intended to define all the rights and duties of partners 406

*Page

2. Partnership articles are to be construed with reference to the objects of the partners . . 407
3. and so as to defeat fraud 407
4. and to prevent unfair advantages 408
5. Any clause, however express, is capable of being abandoned by the tacit consent of all the partners . . . 408
6. Articles of partnership are presumed to apply so long as the parties to them remain partners 410

Sect. 2.—On the usual clauses in articles of partnership, and especially of those relative to

1. The nature and place of the business . . . 412
2. The time of the commencement of the partnership. 412
3. The name or style of the firm 413
4. The duration of the partnership 413
5. The premium 413
6. The capital and property of the firm 414
7. Interest, allowances, &c. 418
8. Conduct and powers of the partners . . . 418
9. Partnership books 420
10. Accounts 420
11. Retiring 422
12. Dissolving 425
13. Expelling 426
14. Valuation of shares 429
15. Transmission of shares and introduction of new partner 433
16. Annuities to widows 435
17. Prohibitions against carrying on business. . . 436
18. Good-will 439
19. Getting in debts 448
20. Assignment of share by retiring partner . . 449
21. Indemnities 450
22. Arbitration clauses 451
23. Penalties and liquidated damages 454

CHAP. X.—Of Actions between Partners 456

Sect. 1.—General observations 456
1. Law before the Judicature acts 456
2. Effect of the Judicature acts 458

Sect. 2.—Parties to actions between partners 459
1. General rule as to partnership actions . . . 459
2. Where some partners may sue or be sued on behalf of themselves and others . . . 461

*Page

SECT. 3.—Cases in which Courts will not interfere between partners. 464
1. Of the rule not to interfere except with a view to a dissolution 464
2. Of the rule not to interfere in matters of internal regulation 466
3. Of the rule not to interfere at the instance of those who have been guilty of laches . . 466

SECT. 4.—Actions for specific performance. 475

SECT. 5.—Actions for misrepresentation and fraud 479
1. General observations 479
2. Actions for damages 481
3. Actions for rescission of contract 482

SECT. 6.—Actions for dissolution, account, &c. 491
1. Of account and discovery 492
(*a*) Of account and discovery generally . . . 492
as to account 492
as to discovery and production of documents . 501
as to payment into Court 505
(*b*) The defences to an action for an account and discovery 506
1. Denial of partnership 507
2. The Statute of Limitations . . . 508
3. Account stated 512
4. Award 514
5. Payment. Accord and satisfaction. . . 515
6. Release 516
(*c*) The judgment for a partnership account . . 516
Just allowances 519
The period over which the account is to extend 519
Account of profits since dissolution . . . 521
The evidence upon which the accounts are to be taken 536
2. Of injunctions 538
3. Of receivers 545
4. Of the sale of partnership property under the order of the Court 555

SECT. 7.—Other miscellaneous actions 559
1. Between persons who have agreed to become partners 559
2. Between partners 560
Note on the law as it stood before the Judicature acts 562

BOOK IV.

OF THE DISSOLUTION AND WINDING UP OF PARTNERSHIPS.

*Page

CHAP. I.—Causes of Dissolution 570

Sect. 1.—The will of any partner 571
1. Of the right to dissolve 571
2. Of the right to retire 573
3. Of the right to expel 574

Sect. 2.—The impossibility of going on ; in consequence of—
1. The hopeless state of the partnership business . . 576
2. Insanity 577
3. Misconduct and destruction of mutual confidence. . 580

Sect. 3.—The transfer of a partner's interest 583
[N. B.—As to Death and Bankruptcy, see below.]

Sect. 4.—The occurrence of some event which renders the continuance of the partnership illegal 585

CHAP. II.—Consequences of Dissolution 586
1. As regards the creditors of the firm 586
2. As regards the partners themselves 587

CHAP. III.—Of Death and its Consequences 590

Sect. 1.—As regards the surviving partners and the executors of the deceased 590

Sect. 2.—As regards joint creditors. 594
1. With reference to what occurred before death. . 594
And herein of actions against executors of deceased partners by creditors of the firm . . . 599
2. With reference to what has occurred since death . 604
And herein of the effect of a trust to employ assets in the business of the firm 607

Sect. 3.—As regards the separate creditors, legatees, and next of kin of the deceased 610
1. Of the rights of the separate creditors and legatees, &c., generally 610
2. When the share of the deceased is not got in . . 614
3. Of shares specifically bequeathed 619

*Page

CHAP. IV.—Of Bankruptcy 622
Preliminary observations 622

Sect. 1.—Adjudications of bankruptcy against partners . . . 625
1. Acts of bankruptcy 625
And herein particularly of fraudulent conveyances. 627
2. The petitioning creditor's debt 633
3. Of joint and separate adjudications . . . 637
And herein of annulling and consolidating adjudications 640
4. Choice of trustee 644
And herein of inspectors to protect special interests 645

Sect. 2.—The property which vests in the trustee and the consequences of such vesting 646
1. Generally. 646
2. Property divisible amongst the creditors. . . 650
3. Of set-off and mutual credit 654
4. Of the time from which the title of the trustee dates 663
And herein of the consequences of the doctrine of relation back as regards
(*a*) transactions with the bankrupt partners . 666
(*b*) transactions with the solvent partners. . 669
(*c*) execution creditors 674

Sect. 3.—Of the doctrine of reputed ownership 676
1. generally 676
2. particularly as regards partners 683
where there has been a change in the firm . 685
where there is a dormant partner. . . . 689

Sect. 4.—The administration of the bankrupt's estate . . . 691
1. General principles 691
2. Of joint estate and of separate estates . . . 697
3. Of joint, separate, and joint and separate debts . . 701
4. Of the proof and payment of partners' debts generally 707
of secured creditors and the rule in *Ex parte Waring* 709
A. Proof against the joint estate 720
the joint creditors 720
the partners 721
the separate creditors 728
B. Proof against the separate estates . . . 729
the separate creditors 730

*Page
the joint creditors 730
the partners 737
C. Proof against both estates 743
General rule as to election 743
Cases in which double proof is allowed . 747
Cases where a secured creditor may split his demand 749

Sect. 5.—The bankrupt's order of discharge. 751

Sect. 6.—Arrangements with creditors 754

INDEX TO TEXT 1207
INDEX TO AMERICAN NOTES 1307

ENGLISH AUTHORITIES CITED.

[Reference is to Star (*) paging.]

[*The pages in which a case is particularly referred to in the text, and is not merely cited, are in the following list denoted by an asterisk.*

The cases in each sheet have been brought down to the latest possible moment. It ought, however, to be mentioned, that no attempt has been made to collect cases decided since the establishment of the Law Reports, and not reported therein.]

	*Page
Abbott *v.* Burbage,	631
v. Smith,	200, 299
Abel *v.* Sutton, 215, 216, 218, 219*,	667, 673
Abell, *ex parte*,	730
Abraham *v.* Hannay,	462, 463
Acerro *v.* Petroni,	90
Ackerman, *ex parte*,	731
Ackroyd, *ex parte*,	645
Acraman *v.* Bates,	682
Adam, *ex parte*,	746, 747
v. Townend,	266
Adams, *ex parte* (3 M. & A.),	716
(1 Rose),	726
v. Bankhart,	129
v. Bingley,	143
Adamson, *ex parte*,	199, 200, 702, 745, 746
v. Jarvis,	370, 377, 378
Addams *v.* Ferick,	594
Addie *v.* Western Bank of Scotland,	163
Addis *v.* Knight,	291, 493, 591, 599, 648
Addison, *ex parte* (3 DeG. & Sm.),	633
(3 Mon. & Ayr.),	632
v. Overend,	278, 279
Adley *v.* Whitstable Co.,	395, 537
Aflalo *v.* Fourdrinier,	752

	*Page
Agace, *ex parte*,	146, 165*, 166, 171, 703
Agacio *v.* Forbes,	277
Agar *v.* Fairfax,	59
v. Macklew,	451
Agra Bank, *ex parte*,	679, 680
Agra and Masterman's Bank, *re*	712
v. Hoffman,	291
A. G. *v.* Birkbeck,	96
v. Borrodaile,	61
v. Brunning,	348
v. Burges,	149
v. Great Northern Railway Co.,	316
v. Higgins,	340
v. Hubbuck,	347
v. Marquis of Ailesbury, and Add. to p. 347	347
v. Mayor of Norwich,	372
v. Siddon,	148, 149
v. Weeks,	149
v. Wilson,	377, 379
Airey *v.* Borham,	68, 381*
Aitcheson *v.* Lee,	665, 675
Akhurst *v.* Jackson,	65, 67
Albion Life Assur. Soc., *re*	32, 385
Albretcht *v.* Sussmann	72, 73
Alcock *v.* Taylor,	121
Alder *v.* Fouracre,	307, 496, 541
Alderson *v.* Clay,	41, 86, 87

	*Page
Alderson *v.* Pope, 141, 170, 174*,	175*
Alexander, *ex parte*,	120
v. Barker,	275
v. Simms, 61,	355
Allcard *v.* Weeson,	753
Allen *v.* Bonnett, 630,	631
v. Hartley,	632
v. Kilbre, 542, 588,	669
Alletson *v.* Chichester,	680
Allfrey *v.* Allfrey, 512,	513
Alliance Bank, *ex parte*,	713
Alliance Bank Limited *v.* Kearsley,	129
Alloway *v.* Braine,	468
v. Steere,	658
Alsager *v.* Currie,	656
v. Rowley, 611,	613
Alston, *ex parte*, 661,	718
Ambler *v.* Bolton, 331, 415,	558
Ambrose *v.* Kerrison.	373
Anderson's case (7 Ch. D.),	63
Anderson, *ex parte* (5 Ch.),	649
(14 Q. B. D.),	703
v. Anderson, 425, 466,	582
v. Maltby, 338, 486, 574, 653,	698
v. Wallace,	544
v. Weston,	214
Andrews, *ex parte*, 722, 738,	740
Andrews and Alexander's case,	51
Andrewes *v.* Garstin,	559
Anglesea Colliery Co.,	403
Anon. (1 Camp. 492),	425
(2 K. & J. 441), 539, 544, 577, 578, 579,	581
(1 Madd. 144),	514
(1 Mod. 215),	654
(12 Mod. 446),	675
(3 Salk. 61, and 12 Mod. 446),	647
v. Layfield,	136
Ansell *v.* Baker, 255,	256
v. Waterhouse,	283
Antram *v.* Chace,	129
Apperley *v.* Page, 463, 499,	500
Appleby, *ex parte*, 702, 705,	706
Appleton *v.* Binks,	177
Apsey, *ex parte*, 160*,	191
Arbouin, *ex parte*, 679, 686, 702,	746
Arbuckle *v.* Taylor,	150
Arden *v.* Sharpe,	171
v. Tucker,	276
Arkwright *v.* Newbold, 163,	481
Arlington *v.* Merrick,	117
Armitage *v.* Winterbottom,	139
Armory *v.* Delamirie,	148

	*Page
Armstrong *v.* Armstrong, 91, 105,	106
v. Lewis,	99
Arnold *v.* Bainbridge,	292
Arnott *v.* Hayes,	537
Arthur *v.* Lamb, 59,	60
Arton *v.* Booth,	145*
Ashby *v.* James,	510
Ashley's case,	490
Ashton *v.* Blackshaw,	679
Ashurst *v.* Mason, 369, 377,	379
Ashworth *v.* Munn,	348
v. Outram,	78
v. Stanwix,	149
Aspinwall *v.* London & North-Western Railway Co., 135, 146, 284,	359
Assignees of Brewster and West, *ex parte*,	689
Astle *v.* Wright, 66, 68,	69
Astley *v.* Johnson,	268*
Athenæum Life Ins. Soc. *v.* Pooley,	191
Athenæum Soc., *re*	201
Atkins, *ex parte*,	725
v. Tredgold,	262
Atkinson *v.* Laing,	286
v. Mackreth, 151,	284
Atkyns *v.* Kinnier, 438,	455
Attwood *v.* Banks,	636
v. Munnings,	130
v. Rattenbury,	274
Attwool *v.* Attwool,	290
Atwood *v.* Maude, 68,	69
Aubert *v.* Maze, 94, 97, 105, 378,	388
Aubin *v.* Holt, 93, 100,	479
Auld *v.* Glasgow Working Men's Building Soc.,	319
Ault *v.* Goodrich, 220*, 260,	511
Aulton *v.* Atkins,	450
Aunand *v.* Honiwood,	342
Austen, *ex parte*, 171,	703
v. Boys, 435, 438, 445,	447*
Austin *v.* Jackson, 402,	518
Aveling *v.* Knipe,	51
Averall *v.* Wade,	369
Avery *v.* Langford 437,	455
Baboo Janokey Doss *v.* Bindabun Doss,	460
Backhouse *v.* Charlton, 133,	135
v. Hall, 118,	119
Backhurst *v.* Clinkard,	357
Backwell *v.* Child,	620
Badeley *v.* Consolidated Bank, 36, 37 38*, 255, and Add. to p.	38

	*Page
Badger *v.* Shaw,	679
Baglehole, *ex parte*,	73
Bagot *v.* Easton,	491, 501
Bagshaw *v.* Parker,	572, 579
Bailey, *ex parte*,	627
v. Bidwell,	169
v. Finch,	659
v. Ford,	559, 577
v. Johnson,	643, 657
Baillie *v.* Goodwin,	266
Baird's case.	124, 212
Baird *v.* Planque,	43
Baker's case,	76
Baker *v.* Charlton,	184*
v. Martin,	612
Baldney *v.* Ritchie,	281
Bale *v.* Cleland,	482
Ball, *ex parte*,	740*
v. Dunsterville,	137
v. Lanesborough,	190
Ballam *v.* Price,	224, 237
Balmain *v.* Shore,	328, 347, 434*
Balsh *v.* Hyham,	371, 374
Bamford, *ex parte*,	633
Banco de Portugal *v.* Waddell,	719, 749
Bank of Australia *v.* Nias,	255
Bank of England, case of,	329, 330* 337, 385
v. Anderson,	96
v. Booth,	96
Bank of Ireland *v.* Perry,	713
Bank of Scotland *v.* Christie,	119, 230
Bankhead's Trusts,	683
Banks, *ex parte*,	743, 744
v. Gibson,	445, 446, 544
Bannatyne *v.* Leader,	630
Banner, *ex parte*,	704
v. Berridge,	260, 511
v. Johnston,	711
Barber, *re* or *ex parte*,	402, 409, 421, 422, 429, 430, 432
v. Barber,	509
v. Mackrell,	601
Barclay, *ex parte*,	733
v. Lucas,	117
Barden *v.* Keverberg	77
Barff, *ex parte*,	651
Barfield *v.* Loughborough,	390
Barfoot *v.* Goodall,	223
Baring *v.* Corrie,	295
v. Dix,	576*
v. Stanton,	307
Barker *v.* Allan,	563
v. Goodair,	359, 671, 675
Barker *v.* Richardson,	145, 146
Barklie *v.* Scott,	12*
Barnard, *re*	186, 193, 598
Barnardiston *v.* Chapman,	562
Barnett, *ex parte* (9 Ch.),	658
(DeG.)	715
Barnett *v.* Lambert,	23
Barnett, Hoares & Co. *v.* South London Tramway Co.,	163
Barnewall, *ex parte*,	161, 162, 617, 702, 745
Baroness Wenlock *v.* River Dee Co.,	191
Barron *v.* Fitzgerald,	113, 114
Barrow, *ex parte*,	48*, 337, 460, 493, 688
Barr's trust, *re*,	680
Barry, *ex parte*,	678
v. Nesham,	23
v. Stevens,	458
Barter, *ex parte*,	651, 653
Bartlett *v.* Vinor,	95
Barton *v.* Hanson,	179, 203, 328
v. Williams,	61, 124, 140, 562 568*
Barwick *v.* English Joint Stock Bank,	163
Bass *v.* Clive,	112
Bassaro, *ex parte*,	645
Bassett *v.* Wood,	255
Batard *v.* Douglas,	24
v. Hawes,	24, 376, 566
Bate, *ex parte*,	256, 704, 750, 754
Bateman *v.* Pinder,	261
Bates, *ex parte*,	75
Bateson, *ex parte*,	641
v. Gosling,	237
Bath, *ex parte*,	719
Batson, *ex parte* (1 Gl. & J.),	645
(Cook's B. L.),	678
Batte *v.* Robbins,	390
Battersby *v.* Smyth,	324
Battley *v.* Lewis,	22, 202, 413
Batty *v.* M'Cundie,	103
Baudier, *ex parte*,	729
Bauerman, *ex parte*,	731, 732
Bawden *v.* Howell,	274
Baxter *v.* Brown,	348
v. Hozier,	560
v. The Earl of Portsmouth,	76, 213
v. Pritchard,	629
v. West,	81, 85, 89, 581
Bayley, *ex parte*,	66
Bayly *v.* Schofield,	425

	*Page
Baynard *v.* Woolley,	377, 379
Beak *v.* Beak,	519, 520
Beale, *re*,	640
v. Caddick,	135, 209, 228, 230, 234
v. Mouls,	206*, 207
Beamish *v.* Beamish,	435
Bear *v.* Bromley,	50
Beard *v.* Webb,	77
Beasley *v.* Beasley,	632
Beaumont *v.* Boultbee,	513
v. Greathead,	224
v. Grover,	493
v. Meredith,	5, 50
Beavan *v.* McDonnell,	76
Beck *v.* Kantorowicz,	464, 480, 496
Beckford *v.* Wade,	260
Beckham *v.* Drake,	144, 147, 178*, 189, 192, 275, 281, 652
v. Knight,	178, 281
Bedford *v.* Bagshaw,	482
v. Brutton,	457, 563, 565, 567
v. Deakin,	244*, 247, 253, 254
Beech *v.* Eyre,	207
Beecham *v.* Smith,	116, 565, 568
Beecher *v.* Guilburn,	391
Beer *v.* Beer,	560
Belcher *v.* Prittie,	630
v. Sykes (8 B. & C.),	337, 449
v. Sykes (6 B. & C.),	450
Beldon *v.* Campbell	133
Bell, *ex parte*,	97, 268*, 270
v. Banks,	257
v. Morrison,	261
v. Phyn,	342*, 346, 347
v. Reid,	73
v. Simpson,	629
Bellairs *v.* Ebsworth,	118
v. Tucker,	481, 482
Bellamy and Metropolitan Board of Works, *re*	151
Belshaw *v.* Bush,	226
Belton *v.* Hodges,	75
Benfield, *ex parte*,	637
Benham *v.* Gray,	328, 562
Beningfield *v.* Baxter,	475, 488, 517, 613, 614
Benjamin *v.* Porteus,	29*
Bennett *v.* Blain,	348
v. Lytton,	594
Benson, *ex parte*,	702
v. Hadfield,	241, 284
v. Heathorn,	309
Bentham Mills Spinning Co., *re*,	652
Bentley, *ex parte*,	746

	*Page
Bentley *v.* Bates,	55, 56, 333, 366, 493, 498, 650
v. Craven,	305*, 380
Beresford *v.* Browning,	194*, 197, 596
Bergmann *v.* Macmillan,	364, 461
Bernasconi *v.* Fairbrother,	638
Berney *v.* Davison,	630, 631
v. Vyner,	630, 631
Berry, *ex parte*,	709
v. Alderman,	169
Besch *v.* Frolich,	579, 583
Besley's case, or Besley, *ex parte*,	24
Betts *v.* Gibbins,	370, 377, 378
Bevan, *ex parte*,	743, 744
v. Attorney-General,	619
v. Lewis,	190*, 359, 461, 542
v. Nunn,	631, 665
Beveridge *v.* Beveridge,	315
Biddlecombe *v.* Bond,	425
Biddulph, *ex parte*,	153*, 717
Bielby, *ex parte*,	746
Bigg, *ex parte*,	747
Biggs *v.* Lawrence,	93, 103, 268
Bignold, *ex parte*,	390
v. Waterhouse,	141, 143*, 172*
Bilborough *v.* Holmes,	250, 251, 252, 706, 707
Billiter *v.* Young,	338, 486, 574, 653
Binford *v.* Dommett,	348
Bingham, *ex parte*,	208, 706
Binney *v.* Mutrie,	402, 403, 421, 517
Birch, *ex parte*,	573
Birley, *ex parte*,	732, 733
v. Kennedy,	505
Birmingham Land Co. *v.* L. & N. W. Rail. Co.,	265
Bischoffsheim, *ex parte*,	754
Bishop, *ex parte*,	719
v. Church,	194*, 195, 596
v. The Countess of Jersey,	153, 158*
Bittleston *v.* Cooke,	629
Blackburn, *ex parte*,	630
Blackburn Building Soc. *v.* Cunliffe, Brookes & Co.,	132, 191
Blackburn, Low & Co. *v.* Vigors,	141, and Add. to p. 141
Blackett *v.* Weir,	86
Blades *v.* Free,	211
Blain, *ex parte*,	265, 300, 624, 625, 633
v. Agar,	492
Blair *v.* Bromley,	146, 153*, 162, 165, 260, 596
Blake, *ex parte*,	729

*Page

Blake *v.* Shaw, 439, 443, 447
Blakeley's (executor's) case, 212
Blakeney *v.* Dufaur, 551, 553
Bland, *ex parte*, 627
Blannin *v.* Taylor, 718
Bleadon *v.* Hancock, 279
Bleckley, *re*, 373
v. Rymer, 508
Blew *v.* Wyatt, 246*, 253
Blisset *v.* Daniel, 304, 315, 402, 407, 408, 421, 426*, 427, 430, 487, 498, 517, 540, 571, 575
Bloxam *v.* Metropolitan Railway Co., 394
Bloxham, *ex parte*, 715
v. Pell, 16, 27*, 28, 29, 30
Bluck *v.* Capstick, 68
Blundell *v.* Winsor, 240
Blyth *v.* Lafone, 452
Blythe, *ex parte*, 722
Boardman, *ex parte*, 730
Boast *v.* Firth, 419
Bock *v.* Gorrisen, 656
Boddam *v.* Ryley, 392, 405
Boddington *v.* Castelli, 290, 653
Bodenham *v.* Purchas, 230
Bolckow *v.* Fisher, 503
Bolitho, *ex parte*, 186, 703
Bolland, *ex parte* (Mont. & McAr.), 155
(7 Ch.), 629, 630
(8 Ch. D.), 628, 659
v. Nash, 657*, 662
Bolton, *ex parte*, 746, 747
v. Puller, 335*, 646, 647, 698
Bonbonus, *ex parte*, 131, 140, 171, 189, 703
Bond, *ex parte*, 743, 744, 746
v. Gibson, 144*, 169*
v. Milbourn, 65
v. Pittard, 15
Bone *v.* Pollard, 51, 323
Bonfield *v.* Smith, 192, 280, 281, 295, 296
Bonnardet *v.* Taylor, 505
Bonser *v.* Cox, 602
Bonville *v.* Bonville, 479
Booth *v.* Bank of England, 96
v. Booth, 617
v. Hodgson, 97, 105
v. Leycester, 389
v. Parkes, 122, 410, 521, 522, 527, 528, 616
Borries *v.* Imperial Ottoman Bank, 295
Borrodailes, *ex parte*, 746
Bosanquet *v* Woodford, 267
v. Wray, 116, 267, 568, 569

*Page

Boswell *v.* Smith, 292
Bottomley *v.* Fisher, 188*
v. Nuttall, 178, 180, 254, 257, 704, 718
Bouch *v.* Sproule, 321, 621
Boulter *v.* Peplow, 566
Boulton, *ex parte*, 680
v. Jones, 186, 286
Bourdillon *v.* Roche, 151
Bourdin *v.* Greenwood, 260
Bourne, *ex parte*, 636
v. Freeth, 44*, 89
Boussmaker, *ex parte*, 72
Bovill *v.* Cowan, 503
v. Hammond, 566, 567
v. Wood, 718
Bowden, *ex parte*, 716
Bower *v.* Marris, 228
v. Swadlin, 237
Bowes, *re*, 656
v. Lucas, 228
v. City of Toronto, 524
Bowker *v.* Burdekin, 137, 631
Bowsher *v.* Watkins, 487, 613
Bowyear *v.* Pawson, 293
Boyce *v.* Douglas, 256
v. Green, 348
Boyd *v.* Emerson, 129
v. Mangles, 659
Boydell *v.* Drummond, 222
v. McMichael, 678
Boyes *v.* Bluck, 238
Boyle, *ex parte*, 657
Boys, *re*, 235
Bradbury, *ex parte*, 707
v. Dickens, 440, 443, 541
Bradley *v.* Millar, 603, 743, 746
Bradshaw, *ex parte*, 731
Braggiotti, *ex parte*, 753
Braham *v.* Beachim, 114
Braithwaite *v.* Britain, 250, 253, 260, 262, 596, 597, 613
v. Skafield, 45
Brand *v.* Boulcott, 277
Brandao *v.* Barnett, 656
Brandon *v.* Hubbard, 277
v. Scott, 268, 269
Brasier *v.* Hudson, 134, 284, 342
Bray *v.* Fromont, 363, 460, 493
Bree *v.* Holbech, 259
Brenmer *v.* Chamberlayne, 206
Brett's case, or *ex parte* (6 Ch. & 8 Ch.), 715, 717
Brett *v.* Beckwith, 11*, 91, 98, 103, 178, 192, 596, 600*, 688, 691
v. Marsh, 228

*Page

Brettel *v.* Williams, 126, 138*
Brewer *v.* Pocock, 594
Brewin *v.* Short, 681, 682
Brewster and West (Assignees of), *ex parte*, 689
Brice's case, 211
Brickland *v.* Newsome, 624
Brickwood *v.* Miller, 676
Bridges *v.* Mitchell, 508
Brierley *v.* Cripps, 564
Brigg's case (1 Eq.), 490
Briggs, *ex parte* (3 D. & Ch.), 16
Bright, *ex parte*, 683
v. Hutton, 24
Brinsmead *v.* Harrison, 256
Bristol, Corporation of, *v.* Westcott, 336
Bristow *v.* James, 280
v. Maxwell, 261
v. Taylor, 134
v. Whitmore, 355
Britain *v.* Rossiter, 81
British and American Telegraph Co. *v.* Albion Bank, 149
British Linen Co. *v.* Drummond, 259
Mutual Bank Co. *v.* Charnwood Forest Rail. Co., 163
Wagon Co. *v.* Lea, 287
Broad, *re*, 710
Broadbent, *ex parte*, 650
Brockbank *v.* Anderson, 88*
Broderick, *ex parte*, 715
Brodie *v.* Howard, 147
Bromley *v.* Williams, 51, 98, 464, 495
Brook, *ex parte*, 708
v. Enderby, 229
v. Garrod, 424, 433
Brooks, *ex parte*, 677
v. Sutton, 516
Broom *v.* Broom, 344*
Broome, *ex parte*, 42, 65, 482, 491, 551, 739*
Brophy *v.* Holmes, 64
Broughton *v.* Broughton, 268, 270
v. Manchester and Salford Waterworks Co., 96
Brown, *ex parte* (1 Atk.), 721
(1 V. & B. and 1 Ro.), 639, 747
(3 M. & A.), 653, 683
(2 M. D. & D.), 724*
(3 DeG. & S.), 740
(9 Ch. D.), 651, 687
v. Adams, 162, 228
v. Boorman, 199
v. Brown, 88

*Page

Brown *v.* Byers, 130, 133
v. Carbery, 646
v. Dale, 342
v. De Tastet, 364, 381, 460, 493, 519, 524, 527*, 528, 616
v. Douglas, 603*, 604
v. Duncan, 95*, 99
v. Gellatly, 592
v. Gordon, 211, 250, 251, 252*, 254, 260, 262, 597
v. Hall, 370
v. Jodrell, 76
v. Kidger, 130, 131
v. Leonard, 41, 175, 214, 217*
v. Litton, 526
v. Oakshot, 332*
v. Perkins, 515, 516*, 538
v. Tapscott, 15, 563, 564, 566
v. Vidler, 526
v. Weatherby, 604
v. Wootton, 256
, Shipley & Co. *v.* Kough, 711
Browne, *ex parte* (1 Rose), 636
(6 Ves.), 681
v. Collins, 394, 620, 621
v. Gibbins, 386
v. Monmouthshire Railway and Canal Co., 393
v. Savage, 680
Brownell *v.* Brownell, 513
Browning *v.* Browning, 406, 430
Brownlie *v.* Russell, 12
Brownrigg *v.* Rae, 140, 269
Brunswick *v.* Slowman, 149
Brutton *v.* Burton, 112, 137, 272
Bryant *v.* Herbert, 199
Brydges *v.* Branfill, 151*, 162, 200
Bryon *v.* The Metropolitan Saloon Omnibus Co., 133
Buchanan *v.* Findlay, 656
Buck, *ex parte*, 683
Buckingham, *ex parte*, 731
Buckland *v.* Johnson, 256
v. Newsame, 624, 634
Buckley, *ex parte*, 189*, 192, 702
v. Barber, 146, 288, 342*, 568, 569, 672
Buddle *v.* Willson, 280
Bugg's case, 584
Bull *v.* O'Sullivan, 133
Bullen *v.* Sharp, 32*, 34, 171
Bullock *v.* Caird, 265
v. Chapman, 446, 544
v. Crockett, 69
v. Dodds, 73

	*Page
Bunn *v.* Guy,	93
Burbidge *v.* Robinson,	504
Burbridge, *ex parte*,	608, 683
Burdekin, *ex parte* (1 Deac.),	641
(2 M. D. & D.),	732
Burden *v.* Burden,	381, 382, 528
Burdikin, *ex parte*,	639, 640, 642
Burdon *v.* Barkus,	66, 81, 121, 326, 328, 330, 384*, 385, 555, 557
Burfield *v.* Rouch,	447
Burgess *v.* Burgess,	114
v. Merrill,	74, 281
Burgue *v.* De Tastet,	90
Burland *v.* Nash,	228, 231*
Burls *v.* Smith,	45, 50, 51
Burlton, *ex parte*,	641
v. Wall,	641
Burmester *v.* Norris,	132, 133, 190
Burn, *ex parte*,	678
v. Burn,	137, 194, 195*, 596, 598
v. Carvalho,	652, 681
Burnaby, *ex parte*,	694
Burnand *v.* Rodocanachi,	325
Burnell *v.* Hunt,	22*, 28, 328, 358
Burnett, *ex parte*,	731
Burns *v.* Poulsom,	148
Burnside *v.* Dayrell,	85
Burrell, *ex parte*,	721
Burroughs *v.* Elton,	613
Burstall *v.* Beyfus,	501
Burt *v.* Moult,	667
Burton *ex parte* (1 Gl. & J.),	680, 685*
(3 M. D. & D.),	161, 162, 702, 717
(13 Ch. D.),	628
v. Green,	356
v. Issitt,	215*
v. Wigley,	454
v. Wookey,	309*
Bury *v.* Allen,	65, 66, 68, 69, 367, 387, 492, 519, 739
v. Bedford,	447
Bush *v.* Martin,	260
Bushell, *ex parte*,	169, 172, 702
Butchart *v.* Dresser,	140, 218, 219*, 220*
Butcher, *ex parte*,	688, 699
v. Pooler,	518
v. Stead,	630
Butler *v.* Butler,	78
Butlin, *ex parte*,	746
Butt *v.* Bilke,	642
v. Monteaux,	107, 463
Butterfield, *ex parte*,	608, 722*
Buxton *v.* Lister,	476
Byers *v.* Dobey,	280
Bygrave, *ex parte*,	641
Cabell *v.* Vaughan,	273, 280, 282
Caddick *v.* Skidmore,	82*
Cahen, *ex parte*,	624
Caldecott, *re*,	739
Calder *v.* Dobell,	177
v. Rutherford,	288
Caldicott, *ex parte*,	716
v. Griffiths,	50, 567
Caledonian Lodge of Freemasons,	50
Calthrop, *re*,	633
Calton *v.* Bragg,	389
Cambefort *v.* Chapman,	255, 256, and Add. to p. 193
Camden *v.* Anderson,	324
Cameron, *re*,	610, 620
Campanari *v.* Woodburn,	211
Campbell *v.* Campbell,	378*, 388
v. Flemings,	490
v. Mullett,	54, 325, 335
Candler *v.* Candler,	100, 549
Cannan *v.* South East Railway Co.,	665
Capper's case,	24
Carew's case,	369, 386
Carlisle Canal Co., *ex parte*,	702
Carmichael *v.* Carmichael,	512
Carne, *ex parte*,	719, 745
v. Legh,	282
Carpenter, *ex parte*,	573, 698, 741, 752
v. Marnell,	653
Carr *v.* L. & N. W. Railway Co.,	40
v. Smith,	565
Carralli and Haggard's claim,	657
Carrick, *ex parte*,	653
Carrington *v.* Cantillon,	272
Carruthers *v.* Sheddon,	112
Carter, *ex parte* (2 Gl. & J.),	737, 742
(1 M. & A.),	753
v. Horne,	59, 307*
v. Southall,	273
v. Whalley,	44, 212*, 214
Caruthers, *ex parte*,	729
Carver *v.* Pinto Leite,	508
Cassels *v.* Stewart,	303, 313*, 364, 423*
Castell, *ex parte*,	726, 736
Castelli *v.* Boddington,	289, 653
Catling *v.* Skoulding,	509
Catskill Bank *v.* Gray,	79

*Page

Catt *v.* Howard, 128
Caughey, *ex parte*, 639
Cavander *v.* Bulteel, 353, 364
Cavendish *v.* Geaves, 293, 296*
Cawthorn *v.* Chalie, 460, 591
Cawthron *v.* Trickett, 277
Cefn Cilcen Mining Co., 132
Central Railway of Venezuela *v.* Kisch, 480
Cesena Sulphur Co. *v.* Nicholson, 394
Chambers, *ex parte* (2 M. & A.), 637, 638
(3 M. & A.), 639
v. Howell, 488
Chancellor, *re*, 615, 620
Chancey *v.* May, 464
Chandler, *ex parte* (9 Ves.), 733
(13 Q. B. D.), 745, 747
v. Danks, 281
v. Dorsett, 304, 486*
v. Parkes, 74
Chapleo *v.* Brunswick Build. Soc., 45
Chapman *v.* Beach, 552
v. Beckington, 118
v. Derby, 654
v. Koops, 357
Chaplin, *ex parte*, 631
Chapple *v.* Cadell, 407*, 497*
Charles *v.* Branker, 90
Charlton *v.* Poulter, 404, 542, 580
Chase *v.* Cox, 227
Chavany *v.* Van Sommer, 571
Chavasse, *ex parte*, 92
Cheap *v.* Cramond, 28, 36
Cheeseman *v.* Price, 581
Cheetham *v.* Crook, 292, 294, 596
v. Ward, 224, 237
Child *v.* Morley, 370, 371, 373
v. Stenning, 501
Childs, *re*, 691
Chippendale, *ex parte*, 126, 191, 374, 382, 389, 390
Chissum *v.* Dewes, 439
Cholmondeley *v.* Clinton, 439
Christian *v.* Taylor, 502*
Christie, *ex parte* (M. & Bl.), 256, 636, 701, 703, 704
(10 Ves.), 661
(3 M. D. & D.), 189, 702
v. Commissioners of Inland Revenue, 450
Christophers *v.* White, 268
Chuck, *ex parte*, 13, 28, 328, 690, 732
v. Freen, 119

*Page

Churton *v.* Douglas, 437, 440, 441*, 445, 543
City Bank *v.* Luckie, 712, 714
City Discount Co. *v.* Maclean, 230, 235
City of London Gas Co. *v.* Nicholls, 144, 178
Clancarty *v.* Latouche, 513
Clark, *re* (3 D. & R.), 100
(De Gex), 189, 192, 702
v. Alexander, 510
v. Cort, 291
v. Cullen, 300
v. Leach, 411, 429
Clarke, *ex parte* (4 Ves.), 730
(1 D. & C.), 637
v. Bickers, 196*, 595
v. Blackstock, 187
v. Clement, 298
v. Dickson, 481, 482, 490
v. Hart, 428, 472, 574
v. Lord Abingdon, 455
v. Tipping, 513
Clarkes, *re*, 256, 704
Clarkson, *ex parte*, 334, 335, 336, 698, 699*
v. Edge, 438, 455
Clavering *v.* Westley, 596
Claxton, *ex parte*, 636, 643
v. Kynaston, 237
Clay, *ex parte* (6 Ves.), 730
(1 Mont. Part.), 733
v. Langslow, 87, 89
Clayton's case, 199, 226*, 228*, 229, 230, 236, 250, 253
Cleather *v.* Twisden, 151, 156*
Clegg *v.* Clegg, 57, 59, 310, 323
v. Edmonson, 308*, 469*, 470, 473, 475, 508, 571
v. Fishwick, 303, 307*, 496, 552, 611
Clements *v.* Bowes, 463, 491, 499, 500, 512
v. Hall, 303, 307, 472, 473*, 475, 527, 528
v. Norris, 309, 314, 315, 412, 540*
Clemontson *v.* Blessig, 72
Clifford *v.* Brook, 458, 482, 492
Clive *v.* Clive, 621
Clough, *re*, 140, 218, 219, 341
v. London and North Western Railway Co. 490
Clowes, *ex parte*, 160, 208, 706, 721
Coates *v.* Coates, 478
Cobham, *ex parte*, 729
Coburn *v.* Collins, 593

	*Page
Cockburn *v.* Thompson,	462, 463
Cockerell *v.* Aucomte,	50, 51
v. Barber,	381
Cockle *v.* Whiting,	339, 485
Cockrill *v.* Sparkes,	263
Cocks *v.* Nash,	224, 237
Coffee *v.* Brian,	566
Cofton *v.* Horner,	466, 543
Cohen, *ex parte*,	627
Colbeck, *re*,	28, 641, 642
Colburn *v.* Patmore,	377
Coldwell *v.* Gregory,	689*
Colegrave *v.* Manley	439
Coleman, *ex parte*	641
v. Riches,	148
v. Mellersh,	513
Colemere, *re*,	629
Coles *v.* Gurney,	272
v. Sims,	455
Collen *v.* Wright,	163, 168
Collett *v.* Foster,	148
Colley *v.* Smith,	567
Collinge, *ex parte*,	692, 737
Collingwood *v.* Berkeley,	42, 45
Collins, *ex parte*,	633
v. Blantern,	106, 370
v. Carey,	268
v. Collins,	433
v. Evans,	370
v. Forbes,	683
v. Jackson,	331*, 414
v. Prosser,	238
v. Young,	548
Collinson *v.* Lister,	141
Collyer *v.* Isaacs,	708
Colonial Bank *v.* Whinney,	680
Colquhoun *v.* Brooks,	394
Colson *v.* Selby,	281
Columbian Government *v.* Rothschild,	501
Colyear *v.* Countess of Mulgrave,	434
Combe's case,	177
Commercial Bank Corp. of India and the East,	248
Connell, *ex parte*,	324, 716, 740
Const *v.* Harris,	304, 314, 315, 316*, 319*, 409, 410, 544, 545*, 551
Cooch *v.* Goodman,	115
Cook, *ex parte* (2 P. W.),	646, 692*
(Mont),	726*
v. Catchpole,	453
v. Collingridge,	429, 488, 489, 517, 519, 528*, 555*, 557, 573, 617, 619*
v. Rhodes,	458
Cooke *v.* Batchellor,	278
v. Benbow,	389, 391, 417*, 418
v. Cooke,	452
v. Eshelby,	295
v. Seeley,	276*
Cookson *v.* Cookson,	343*, 346, 347
Coomer *v.* Bromley,	153, 156, 159*
Coope *v.* Eyre,	15*, 18, 53*
Cooper, *ex parte*, (1 M. D. & D.)	334, 337, 687*, 699, 700
(2 M. D. & D.),	740
(10 Ch.),	628
v. Chitty,	675
v. Hood,	479
v. Met. Board of Works,	439
v. Pritchard,	752
v. Wandsworth Board of Works,	427
v. Watlington,	442
v. Watson,	442*
v. Webb,	463, 499
Cope *v.* Rowlands,	95, 97
Copeland, *ex parte*,	140, 687
Copeman *v.* Gallant,	687
Copeland, *ex parte*,	729
v. Toulmin,	228, 230, 234, 349, 359
Coplestone, *ex parte*,	718
Coppard *v.* Allen,	284
Corbett, *ex parte*,	111, 748
Corbridge, *ex parte*,	37, 722
Corcoran *v.* Witt,	453
Cork and Brandon Railway Co. *v.* Cazenove,	76
Cork and Youghal Railway Co.,	191
Cornelius *v.* Harrison,	43
Cornill *v.* Hudson,	258
Corpe *v.* Overton,	75
Corporation of Bristol *v.* Westcott,	336
Corry *v.* Londonderry and Ennis-killen Railway Co.,	191, 393
Corsellis, *re*,	268
Cossart, *ex parte*,	752
Costeker *v.* Horrox,	505, 506
Cothay *v.* Fennell,	276, 277
Cottam *v.* Partridge,	259, 510
Cotton, *ex parte*,	678
Couldery *v.* Bartrum,	714, 746
Coulson, *ex parte*, 624, and Add. to pp. 78 and 626	
Courtenay *v.* Wagstaff,	21
Courtivron *v.* Meunier,	753
Cousins *v.* Smith,	104
Coventry *v.* Barclay,	409, 421*, 429, 430, 432
Cowell *v.* Edwards,	376

	*Page
Cowell *v.* Sikes,	598, 599
v. Watts,	82, 83, 468*
Cowslad *v.* Cely,	283
Cox's Trusts, *re*,	621
Cox *v.* Hickman,	26, 30*, 31*, 33, 35, 36, 39, 126
v. Hubbard,	276
v. Stephens,	460
v. Willoughby,	411
Cradock *v.* Piper,	268
Cragg *v.* Ford,	387*, 388*
Cragoe *v.* Jones,	239
Cramer *v.* Bird,	463
Craven, *ex parte*,	629, 630
v. Edmondson,	668*
v. Widdows,	729
Crawford *v.* Hamilton,	363, 583, 590
v. Stirling,	138
Crawshay *v.* Collins,	218, 323, 340, 381, 402, 410, 517, 519, 520, 525, 526*, 555, 574, 588, 592, 647, 648, 649
v. Maule,	55, 56, 57, 121*, 122, 218, 331, 333*, 363, 366, 555, 557, 558, 559, 571, 583, 587, 590
Creak *v.* Capell,	506
Crellin *v.* Brook,	125
Cresswell *v.* Hedges,	59
Creuze *v.* Hunter,	389
Crew, *ex parte*,	639, 640
Cridland, *ex parte*,	640, 642
Crispin, *ex parte*,	624
Croft *v.* Allison,	148
v. Pike,	339, 354, 599
Crofts, *ex parte*,	723, 734
Cropper *v.* Knapman,	613
Crosbie *v.* Guion,	590
Crosby *v.* Crouch,	630
Crosfield, *ex parte*,	731
Cross *v.* Cheshire,	564
v. Williams,	50
Crosse *v.* Smith,	224
Crossfield *v.* Such,	51
Crossman *v.* The Queen,	594
Crowder, *ex parte*,	692
Croxton's case	382, 386
Cruikshank *v.* McVicar,	377, 480, 492, 520*
Cruse *v.* Paine,	375
Cruttwell *v.* Lye,	440
Cubitt *v.* Porter,	562
Cuffe *v.* Murtagh,	122
Cullen *v.* Thomson's Trustees and Kerr,	482
Cumberledge *v.* Lawson,	137
Cummins *v.* Cummins,	240
Currie, *ex parte*,	753
Curry, *re*,	690
Curtis's case,	75
Curtis *v.* Barclay,	370, 372
v. Perry,	324
Cust, *ex parte*,	734
Custance *v.* Bradshaw,	348
Cutbush *v.* Cutbush,	609
Cutten *ex parte*,	640, 642
v. Sanger,	425
Dacie *v.* John,	554*
Dadswell *v.* Jacobs	504
Daintry, *re*,	645
Dale *v.* Hamilton,	63, 81*, 82, 85, 129, 304, 434, 477*
Dally *v.* Wolverston,	752
Dance *v.* Girdler	118
Daniel *v.* Cross	247, 251, 596
Daniell *v.* Roy. Brit. Bank,	491
v. Sinclair,	514
Dann, *ex parte*,	629
Darby *v.* Boucher,	191
v. Darby,	340, 345*, 346
Darwent *v.* Walton,	194, 283, 596
Davenport, *ex parte*,	716
David *v.* Ellice,	242*, 243, 253
Davidson, *ex parte*,	739, 740
v. Napier,	439, 542, 669*, 670
v. Tulloch,	482, 595
Davies *v.* Davies (2 Keen),	487*, 494, 613, 614
v. Davies (36 Ch. D.),	437, 442
v. Games,	333
v. Hawkins,	316
v. Hodgson,	437, 440, 442, 444
v. London and Prov. Marine Ins. Co.,	480
v. Makuna	98, 99
Davis's case (12 Eq.),	715
Davis, *ex parte* (4 De G. J. & S.),	21, 727, 741
v. Amer,	448, 479, 543, 550*
v. Fisk,	462
v. Jones,	412
v. Johnston,	60, 470*
v. Morris,	300
Davison, *re*,	256, 257, 704, 745, 747
v. Donaldson,	249
v. Farmer,	637
v. Gillies,	394
v. Robertson,	130, 184
Davys *v.* Douglas,	101

*Page

Dawe *v.* Vergara, 625
Dawkins *v.* Antrobus, 466
Dawson, *ex parte* 645
v. Beeson 437, 440
v. Dawson, 514
v. Fitzgerald, 452
Dean *v.* Allen, 594
v. Macdowell, 312, 419
v. Newhall, 225, 237
v. Wilson, 558
Dear, *ex parte*, 699
Deare *v.* Soutten, 191
De Begnis *v.* Armistead, 101, 105*
De Berenger *v.* Hamel, 581
De Berkom *v.* Smith, 40, 49, 88
De Bussche *v.* Alt, 306, 307, 467
Deeks *v.* Stanhope, 460, 461, 499
Deeze, *ex parte*, 655, 658
Defries *v.* Creed, 554
De Gendre *v.* Kent, 621
De la Rosa *v.* Prieto, 99
De la Rue *v.* Dickinson, 508
Delauney *v.* Strickland, 50, 51
Delhasse, *ex parte*, 11, 35, 38*
Deloraine *v.* Browne, 475
De Mattos *v.* Saunders, 654
De Mautort *v.* Saunders, 192, 281, 295
De Mazar *v.* Pybus, 114
Dent *v.* London Tramways Co., 394
v. Turpin, 62
Denton *v.* Great Northern Railway Co., 482
v. Macneil, 490
v. Peters, 565
v. Rodie, 131, 390
Denys *v.* Schuckburg, 55
De Ribeyre *v.* Barclay, 131, 153*, 160, 165
Dering *v.* Winchelsea, 368, 376
Derry *v.* Mazarine, 77
De Tastet, *ex parte*, 734
v. Bordenave 217, 541
v. Bordieu, 551
v. Carroll, 145
v. Shaw, 111, 115, 568, 569
Deux *v.* Jeffries, 145
Devaynes *v.* Noble, 194, 517, 595, 596, 597, 601, 605*
Devaynes *v.* Noble,
Baring's case, 152*, 161, 165, 200, 596
Bryce's case, 211, 605
Clayton's case, 152*, 250, 596, 597
Houlton's case, 47, 211, 605

*Page

Devaynes *v.* Noble,
Johnes's case, 211, 605
Palmer's case, 250, 596
Sleech's case, 161, 194, 200, 250, 596, 597, 602
Warde's case, 596
Dever, *ex parte* (No. 1), 710, 711
(No. 2), 710, 713
Dewdney, *ex parte*, 633
Dewhurst, *ex parte* (7 Ch.), 639
(8 Ch.), 713
Dickenson *v.* Lockyer, 240
Dickin, *ex parte*, 675
Dickinson *v.* Valpy, 20, 42*, 85, 125, 127, 129*, 130, 203
Dickson *v.* Cass, 663, 668
Digby, *ex parte*, 28, 640, 641, 642
Diggle *v.* Higgs, 106
Dimes *v.* Scott, 620
Dimsdale *v.* Robertson, 452
Dinham *v.* Bradford, 390, 433
Dixon, *ex parte*, 746
v. Clark, 226
v. Cooper, 29
v. Hammond, 288, 341
v. Holden, 544
v. Wilkinson, 152
Dobbin *v.* Foster, 286
Dobell *v.* Stevens, 481
Dobinson, *ex parte*, 702
Dobson, *ex parte*, 681
Docker *v.* Somes, 523, 536, 615, 617
Dockway *v.* Dickenson, 279
Doddington *v.* Hallet, 61, 339, 352
Dodgson, *ex parte*, 565, 741
Doe *v.* Baker, 280
v. Bluck, 328, 562
v. Horn, 562
v. Hulme, 139
v. Ingelby, 634
v. Miles, 328, 572
v. Prosser, 58
v. Roe, 273
v. Summersett, 139
Dolman *v.* Orchard, 214, 215, 216
Domville *v.* Solly, 506
Donaldson *v.* Williams, 147
v. Williamson, 314
Doo *v.* Chippenden, 281
Doran *v.* Simpson, 613
Dore *v.* Wilkinson, 146
Dorman, *ex parte*, 685
Doubleday *v.* Muskett, 45
Douglas *v.* Patrick, 136
Dover *v.* Opey, 104

*Page

Downam *v.* Matthews, 294
Downs *v.* Collins, 433, 434, 476, 479, 555, 573
Drake *v.* Mitchell, 256, 704
v. Symes, 502*, 503
Draper *v.* Manchester and Sheffield Railway Co., 504
Drennen *v.* London Ass. Co., 20
Dresser *v.* Norwood, 141
Drew *v.* Drew, 507
v. Nunn, 76, 213
Driver *v.* Burton, 274
Drouet *v.* Taylor, 85
Drury *v.* Drury, 59
Dry *v.* Boswell, 12, 29*
v. Davey, 118
Dublin and Wicklow Railway Co. *v.* Black, 75
Dubois *v.* Ludert, 281, 295
Ducarry *v.* Gill, 180
Duckworth, *re*, 657
Dudgeon *v.* O'Connell, 135, 137
Duff *v.* East India Co., 134
Duignan *v.* Walker, 437
Duke of Brunswick *v.* Slowman, 149
Duke of Northumberland *v.* Todd, 117
Duncan, *ex parte*, 639, 642
v. Chamberlayne, 680
v. Hill, 89
v. Lowndes, 138, 179
v. Luntley, 458, 492
Dundonald *v.* Masterman, 151
Dunlop, *ex parte*, 704
Dunn *v.* Campbell, 505
Dunne *v.* English, 306*
Dunnicliff *v.* Mallett, 62
Durham's case, 201
Dutch West India Co. *v.* Moses, 115
Dutton v. Morrison, 357, 359, 632, 671, 675, 695
Duvergier *v.* Fellowes, 99, 102*
Dyke *v.* Brewer, 207*
Dyster, *ex parte*, 690

Eager *v.* Barnes, 153
Eason *v.* Henderson, 560
Easterbrook *v.* Barker, 30
Eastern Union Railway Co. *v.* Cockrane, 118
East India Co. *v.* Blake, 383, 384, 455
Eastwood *v.* Bain, 180
Easum *v.* Cato, 655, 656*
Ebbett's case, 76
Ebbs *v.* Boulnois, 752, 756
Eberle's Hotels Co. *v.* Jonas, 658

*Page

Eckhardt *v.* Wilson, 289
Eddie *v.* Davidson, 357
Edgington *v.* Fitzmaurice, 481
Edmiston *v.* Wright, 373*
Edmonds, *ex parte*, 722, 723*
v. Bushell, 181*
Edmonson *v.* Davis, 101
Edmunds *v.* Robinson, 69
v. Wallingford, 369, 373
Edmundson *v.* Thompson, 43, 85, 202
Edwards, *ex parte* (1 Atk.), 660
(13 Q. B. D.), 665
(14 Q. B. D.), 703
v. Aberayron Mutual Soc., 98, 452
v. Cooper, 666
v. Glyn, 630, 653
v. Hooper, 666
v. Martin, 678, 680
v. Scarsbrook, 709
Eggington *v.* Cumberledge, 272
Ekins *v.* Brown, 340
Elbinger Actien, &c. *v.* Claye, 275
Electric Telegraph Co. of Ireland, 575
Elgie *v.* Webster, 564
Elliot *v.* Brown, 328, 341, 541
v. Davis, 130, 137
Elliott *v.* Turquand, 663
Ellis, *ex parte* (Mon. & Bl.), 673
(2 Gl. & J.), 737, 742
v. Kelly, 99
v. Schmœck, 42
v. Walker, 620
Ellis *v.* Ward, 22
v. Watson, 90
Elston, *v.* Deacon, 171
Elmer *v.* Creasy, 507
Elphinstone *v.* Monkland Iron and Coal Co., 455
Elton, *ex parte*, 692, 730
Emly, *ex parte*, 325, 329, 703, 731
v. Lye, 186, 189*
Emma Silver Mining Co. *v.* Grant, 707, 752
Emmet *v.* Butler, 216
Empress Engineering Co., *re*, 434
Empson's case, 88
Enderby, *ex parte*, 690
Endo *v.* Caleham, 512
England *v.* Curling, 312, 409, 413, 476*, 517, 539*
English and American Bank, *ex parte*, 716
English and Irish Church and Univ. Insur. Soc., 32*
Erichsen *v.* Last, 394

*Page
Ernest *v.* Nicholls, 189
Essell *v.* Hayward, 582*
Essex *v.* Essex, 81, 333, 345*, 411, 429, 479
Estwick *v.* Conningsby, 551
European Bank, *ex parte*, 719
Evans, *re*, 604, 606, 607*
v. Buck, 501
v. Coventry, 391, 517, 539, 546*, 551
v. Curtis, 112
v. Drummond, 213, 214, 243, 244, 247*, 253, 255
v. Hooper, 458
v. Richardson, 72, 92, 104
v. Smallcombe, 467
v. Stokes, 460, 461
v. Yeatherd, 386
Everet *v.* Williams, 93*
Everett *v.* Backhouse, 671, 729
Evereth *v.* Blackburne, 97
Ewart *v.* Williams, 537
Ewer *v.* Ambrose, 86
Ewing, *re*, 340
v. Ewing, 390, 430
v. Osbaldiston, 101, 102*, 355
Eyre, *ex parte*, 148, 153, 158*, 179

Faikney *v.* Reynous, 105
Fair *v.* McIver, 659, 663
Fairburn *v.* Pearson, 552
Fairlie, *ex parte*, 704, 706
v. Fenton, 177
v. Quin, 272
Fairthorne *v.* Weston, 465, 497*, 540, 575, 582
Faith *v.* Richmond, 184*, 185*
Falcke *v.* Scottish Imp. Ins. Co., 372
Faldo *v.* Griffin, 213
Falkland *v.* Cheney, 420
Fannin *v.* Anderson, 258
Farhall *v.* Farhall, 47, 606
Farlow, *ex parte*, 753
Farquhar *v.* Hadden, 340, 619
Farr *v.* Pearce, 437, 444
Farrar *v.* Beswick, 349, 568
v. Deflime, 214
v. Hutchinson, 135, 270
Farrington *v.* Chute, 515
Fauntleroy's case, 155
Faxcett *v.* Whitehouse, 303, 313*, 391, 494, 496
Featherstone *v.* Hunt, 244, 249
Featherstonhaugh *v.* Fenwick, 121, 122, 307*, 340, 410, 413, 527, 555, 571, 574, 592

*Page
Featherstonhaugh *v.* Turner, 66, 381, 423*, 424, 479, 525, 527, 528, 536*, 616
Fell, *ex parte*, 334, 336, 687, 688, 698
Fennings *v.* Grenville, 19, 61, 316, 562
Fereday *v.* Hordern, 16, 30
v. Wightwick, 55, 57, 333, 517, 728
Fergusson *v.* Fyffe, 128, 139, 247, 390
Ferns *v.* Carr, 65, 66, 67
Ferrar, *re*, 703
Fewings, *ex parte*, 255
Ffooks *v.* South Western Railway Co., 410
Field, *ex parte*, 731
v. Carr, 230
Fife, *ex parte*, 624
Banking Co., *ex parte*, 322
Figes *v.* Cutler, 80, 559
Figgins *v.* Ward, 273
Finch, *ex parte*, 588, 652, 669
Findlay, *ex parte*, 599, 720, 728, 730
Finkle *v.* Stacey, 18
Firbanks Ex. *v.* Humphreys, 45, 163, 481
Fisher, *ex parte*, 628, 629
v. Bridges, 105
v. Farrington, 601
v. Keane, 466
v. Liverpool Marine Insur. Co., 98
v. Taylor, 132, 133, 190, 203
Fitzgibbon *v.* Scanlan, 308
Fitzherbert *v.* Mather, 141
Fleet *v.* Murton, 177
Fleming *v.* Manchester, Sheffield & Lincolnshire Railway Co., 199
Flemyng *v.* Hector, 50
Fletcher, *ex parte*, 678, 685
v. Dyche, 291
v. Stevenson, 594
Flint, *ex parte*, 656, 661
Flintoff, *ex parte*, 702, 703
Flintum, *ex parte*, 729
Flitcroft's case, 394
Flockton *v.* Bunning, 522, 524, 530*, 535, 615, 617, 618
Flood *v.* Patterson, 263
Flower, *ex parte*, 711
v. Young, 85
Flyn, *ex parte*, 683, 687
Foley, *ex parte*, 101
v. Hill, 508
Forbes *v.* Skelton, 259
v. Steven, 348
Ford, *re* (8 Dowl.), 152

*Page

Ford, *ex parte* (1 Ch. D.), 639
(3 M. D. & D.), 715
(18 Q. B. D.), 626
v. Tynte, 538
v. Whitmarsh, 42
Fordyce's case, 634*, 635
Fore Street Warehouse Co. *v.* Durrant & Co., 266
Forman *v.* Homfray, 494, 497
Forrester *v.* Bell, 24
Forshaw, *re*, 120
Forster, *ex parte*, 651
v. Hale, 81*, 82, 324
v. Lawson, 278
v. Mackreth, 133
v. Smith, 659*
v. Wilson, 663
Foss, *ex parte*, 678, 681
v. Harbottle, 466
Foster *v.* Ailanson, 564, 668
v. Crabb, 562
v. Donald, 505, 506
v. Hodgson, 509
Fowler *v.* Coster, 639
v. Raynal, 113
v. Wyatt, 514
Fox *v.* Clifton, 12, 25, 43, 83, 85, 90, 365
v. Frith, 565
v. Hanbury, 146, 212, 218, 562, 568, 569*, 583, 647, 648. 649, 666, 671*, 672
Foxley, *ex parte*, 627
France *v.* White, 292
Francis *v.* Doe, 562
Frankland *v.* McGusty, 171
Franklyn, *ex parte*, 730
v. Thomas, 359
Franks, *ex parte*, 77
Fraser *v.* Hill, 99
v. Kershaw, 542, 549*, 568, 588, 671, 673
v. Murdock, 374
Freeland *v.* Stansfield, 67, 69, 542. 549, 670
Freeman, *ex parte* (Buck), 208, 705 706, 745
(Cooke's B. L.), 725
v. Cooke, 40
v. Fairlie, 404, 504, 537
v. Gainsford, 348
v. Lomas, 291
v. Pope, 627
Freen, *ex parte*, 119
French *v.* Andrade, 291, 341

*Page

French *v.* Fenn, 665*
v. French, 209
v. Macale, 455
v. Styring, 14, 18*, 51, 54, 564
Freshney *v.* Carrick, 677, 682
Frietas *v.* Dos Santos, 492
Frith *v.* Cartland, 162
v. Forbes, 711
Fromont *v.* Coupland, 13*, 328, 565, 567
Frost *v.* Moulton, 121, 122
Frowde *v.* Williams, see Add. to p. 38
Fry, *ex parte*, 208, 705, 706, 745
Fryer *v.* Ward, 619
Fuller, *ex parte*, 695
Furnival *v.* Weston, 145*

Gabriel *v.* Evill, 21*, 202
Gadd *v.* Houghton, 179
Gainsborough *v.* Stork, 430
Gainsford *v.* Griffith, 455
Gale *v.* Leckie, 14, 559, 563
v. Lewis, 680
Gallimore, *ex parte*, 636
Galway *v.* Matthew, 170*, 174*, 175*, 188*, 190, 210, 370
Games, *ex parte*, 631
Garbett *v.* Veale, 361, 676
Garden Gully Co. *v.* McLister, 470, 472, 475, 498
Gardiner *v.* Childs, 14, 144, 179, 203
Gardner, *ex parte*, 639
v. London, Chat. & Do. Ry. Co., 545
v. McCutcheon, 309*
v. Rowe, 630
Gardom, *ex parte*, 138
Garland, *ex parte*, 28, 593, 604, 608*, 609, 722, 724
v. Jacomb, 131, 171, 216
Garrand *v.* Hardey, 93
Garratt *v.* Handley, 275*
Garstin *v.* Asplin, 359
Gaskell *v.* Chambers, 506
Geaves, *ex parte*, 151, 161, 683, 702, 716
Geddes *v.* Wallace, 10, 13, 15, 64 385, 393, 409
Gedge *v.* Trail, 487, 613
Gellar, *re* (1 Rose), 28, 140
Geller, *ex parte* (2 Madd.), 733*
Gemmel, *ex parte*, 353
General Co. of Land Credit, 91

*Page

General South American Co., *ex parte*, 712
George *v.* Clagett, 295
Gerhard *v.* Bates, 482
German Mining Co.'s case, 191, 383
Gething *v.* Keighley, 513
Gibblett *v.* Read, 443
Gibbons *v.* Wilcox, 90
Gibbs, *ex parte*, 753
v. Guild, 260
v. Merrill, 74, 281
Gibson, *ex parte* (2 Mon. & Ayr.), 337, 699
(4 Ch.), 248
v. Goldsmid, 479
v. Lupton, 18*, 54
Gilchrist, *ex parte*, 78
Gill, *ex parte*, 741
v. Manchester, Sheffield, &c., Railway Co., 78
Giliam, *ex parte*, 642
Gillan *v.* Morrison, 369, 374, 385
Gillett, *ex parte*, 683
v. Thornton, 411, 453
Gillow *v.* Lillie, 130
Gilpin *v.* Enderby, 13, 16, 30
Ginesi *v.* Cooper & Co., 440
Glassington *v.* Thwaites, 312, 316, 423*, 540*
Gleadon *v.* Tinkler, 169
Gleadow *v.* Hull Glass Co., 382, 383, 386
Gledstanes, *ex parte*, 653
Glengall (Earl of) *v.* Fraser, 503
Glenny *v.* Smith, 446
Gliddon, *ex parte*, 111, 721, 725, 737*
Glossop *v.* Colman, 74
Gloucester, Aberystwith, &c., Railway Co., *re*, 133
Glyn, *ex parte*, 653
v. Caulfield, 504
v. Hood, 364, 584
Goddard *v.* Cox, 228
v. Hodges, 28, 227, 567, 584
v. Mansfield, 454
Godfrey, *ex parte*, 755
v. Macaulay, 222
v. Turnbull, 222
Gold *v.* Canham, 543
Golding *v.* Vaughan, 291
Goldsmid *v.* Cazenove, 748
Goldsmith *v.* Levy, 271
Good, *ex parte* (5 Ch. D.), 239
(21 Ch. D.), 669
v. Blewitt, 463

*Page

Goodall, *ex parte*, 753
v. Skerratt, 259
Goode *v.* Harrison, 74, 76*
Goodman, *ex parte*, 715
v. De Beauvoir, 271
v. Whitcombe, 301, 404, 546, 548, 551, 580
Goodtitle *v.* Tombs, 58
v. Woodward, 139
Goodwin *v.* Parton, 263
Gordon, *ex parte*, 599, 649, 722, 723
v. Ellis, 131, 140, 269, 292, 293*, 294*, 296*
v. Howden, 99
v. Rutherford, 519
Gorham *v.* Thompson, 222
Gorrie *v.* Woodley, 112
Gothenburg Commercial Co., *re*, 710
Gough *v.* Davies, 246*, 253
Gould, *ex parte*, 152
re, *ex parte* Official Receiver, Add. to p. 628
v. Shoyer, 643
Goulding and Davies, *ex parte*, 173, 703
Gouthwaite *v.* Duckworth, 204, 205*
Gover's case, 480
Gow *v.* Forster, 621
Gowan *v.* Forster, 261
Gowar, *re*, 644
Grace *v.* Smith, 26, 27*, 28, 29, 30
Graham, *ex parte*, 706
v. Chapman, 629
v. Furber, 677, 681
v. Hope, 222, 223
v. McCulloch, 687, 689*, 700
v. Mulcaster, 638, 646
v. Robertson, 289, 565
v. Wichelo, 240
Grain's case, 247
Grammar *v.* Nixon, 148
Grant *v.* Jackson, 85, 89, 128
v. Norway, 148
v. Prosser, 272
Graves *v.* Cook, 565
v. Sawcer, 568
Gray, *ex parte*, 635*
v. Chiswell, 598, 599
v. Haigh, 405, 538
v. Pearson, 51, 458
Grayburn *v.* Clarkson, 612
Grazebrook, *ex parte*, 741*
Great Luxembourg Railway Co. *v.* Magnay, 508

*Page

Great Western Colliery Co. *v.* Tucker, 508
Western Insurance Co. *v.* Cunliffe, 307, 458, 492
Western Railway Co. *v.* Rushout, 315
Greatrex *v.* Greatrex, 404, 420, 542
Green (3 De G. & J.), 644
(1 D. & C.), 693
v. Beesley, 11*
v. Briggs, 54, 61, 62, 355
v. Deakin, 171
v. Greenbank, 74
v. Humphreys, 260
v. Waring, 454
v. Weaver, 97
Greenham *v.* Gray, 11, 12, 14, 563
Greening *v.* Clarke, 679
Greenshield's case, 650
Greenslade *v.* Dewer, 131, 132, 203
Greenwood's case, 175
Gregory *v.* Hurrill, 259
v. Patchett, 314, 394
Grellier *v.* Neale, 89
Greville *v.* Greville, 113
Griffin, *ex parte*, 636
v. Ashby, 262
Griffith, *re* (12 Ch. D.), 621
ex parte (23 Ch. D.), 623, 629
v. Paget, 395
Griffiths, *re*, 257
v. Griffiths, 120, 439
Grill, *ex parte*, 736
Grisewood's case (or *ex parte*), 93
Grissell, *ex parte*, 624
Griswold *v.* Waddington, 72, 585
Groom, *ex parte*, 716, 750
Gross *v.* Dufresnay, 647
Groux's Soap Co. *v.* Cooper, 118
Grugeon *v.* Gerrard, 714
Grylls, *ex parte*, 644
Guidon *v.* Robson, 89, 274, 277
Guion *v.* Trask, 364
Gurney, *ex parte*, 336, 698, 699, 705, 706
v. Evans, 89, 181
Guthrie *v.* Fisk, 633
Gwyn *v.* Godby, 389

Habershon *v.* Blurton, 358, 359, 360, 493
Hackwell *v.* Eustman, 493
Haddon *v.* Ayers, 563
Hadley, *ex parte*, 752
v. Macdougall, 504

*Page

Hagell *v.* Currie, 506
Hague *v.* Rolleston, 646, 649, 667*, 668
Haig *v.* Gray, 284, 342
Haines, *ex parte*, 644
Hale *v.* Allnutt, 630
v. Hale, 108, 520, 552*, 555
Hales *v.* Petit, 340
Halfhide *v.* Fenning, 452
Halket *v.* Merchant Traders' Loan and Insur. Assoc., 201
Hall, *ex parte* (3 Deac.), 741
(DeGex), 638
(Mon. & Ch.) 633, 636
(9 Ves.), 731
(17 Ves.), 624
v. Bainbridge, 177, 281
v. Barrows, 447
v. Curzon, 86
v. Fennell, 608
v. Franklin, 71
v. Hall (12 Beav. and 3 Mac. & G.), 539, 540*, 545*, 546, 547, 549, 572
(20 Beav.), 447
v. Huffam, 341
v. Lanning, 271
v. Noyes, 508
v. Rougham, 341
v. Smith, 188
v. West, 183*
Hallett *v.* Dowdall, 201
Hallett's estate, *re*, 162, 228, 234
Halliday, *ex parte*, 628
Hambridge *v.* De la Crouée, 272
Hambro *v.* Hull and London Fire Insurance Co., 184
Hamer, *ex parte*, 644
v. Giles, 517, 518
Hamers' Devisees' case, 212
Hamil *v.* Stokes, 66, 67, 69, 482, 739
Hamilton *v.* Bell, 677, 682
v. Smith, 24, 385
Hammersley *v.* Knowlys 227
Hammond, *ex parte*, 752
v. Douglas, 343, 344, 526
v. Ward, 543
Hampden *v.* Walsh, 106
Hamper, *ex parte*, 28, 29*, 30, 328, 359, 633, 637, 640
Hancock *v.* Bewley, 62
v. Haywood, 289, 647
v. Hodgson, 177
Hankey *v.* Garratt, 671
v. Hammock, 609

*Page
Hankey *v.* Smith, 657
Hanslip *v.* Kitton, 350
Hanson, *ex parte*, 661
Harcourt, *ex parte*, 636
Hardcastle, *ex parte*, 640*
Harding, *ex parte* (15 Eq.), 682
(12 Ch. D.), 138, 179, 192
v. Glover, 548, 551
v. Williams, 537
Hardinge *v.* Webster, 543
Hardman *v.* Booth, 41
Hare, *ex parte*, 325, 328, 684*
v. London and North-Western Railway Co., 507
Hargreaves, *ex parte*, 721, 722*, 726, 736
v. Hall, 559
Hargrove, *ex parte*, 98
Harkness *v.* Steward, 482
Harley *v.* Greenwood, 718
Harman, *ex parte*, 721
v. Johnson, 131, 151, 156*
Harper, *ex parte* (1 De G. & J.), 435*, 436
(20 Ch. D.), 636
v. Godsell, 140, 569
Harrington *v.* Churchward, 35, 493
Harris, *ex parte* (1 Mad.), 187, 686*, 700, 732
(1 Ro. and 2 V. & B.), 721, 725, 734
v. Farwell, 247, 250, 251*, 596, 600, 644
v. Fergusson, 51
v. Harris, 507
v. Hill, 89
v. Nickerson, 480
v. Rickett, 629
Harrison, *ex parte* (2 Rose), 54, 61
(2 Gl. & J.), 641
(28 Ch. D.), 652
v. Armitage, 496, 546
v. Barton, 51
v. Bevington, 278, 279
v. Brown, 463
v. Gardner, 440, 442*
v. Jackson, 137, 271
v. Millar, 97
v. Tennant, 575, 580, 581*, 582
Hart *v.* Alexander, 223, 284*, 254
v. Clarke, 390, 391, 428, 470, 472*, 473, 475, 572, 574
Hartley *v.* Manton, 238*
Hartop, *ex parte*, 177, 190, 703
Hartz *v.* Schrader, 542, 547
*Page
Harvey *v.* Beckwith, 51, 464, 517
v. Bignold, 460, 461
v. Collett, 105, 106, 463
v. Crickett, 218, 569, 667, 672*, 674
v. Kay, 87, 89
v. Towers, 169
Harwood *v.* Edwards, 271*
Hasleham *v.* Young, 138
Hassel *v.* Simpson, 631
v. Merchant Traders' Loan and Insurance Assoc., 201
Hassells *v.* Simpson, 631
Hatchard *v.* Mége, 595
Hatton *v.* Royle, 129, 272
Hawken *v.* Bourne, 124, 133, 176
Hawker, *ex parte*, 627
Hawkins *v.* Hawkins, 328, 334, 337, 541
v. Parsons, 517
v. Penfold, 663
v. Ramsbottom, 290
v. Whitten, 663
Hawkshaw *v.* Parkins, 135, 137, 145, 359
Hawtayne *v.* Bourne, 126, 132, 190
Hawtrey, *ex parte*, 685
Hay, *ex parte*, 254, 704, 743
v. Fairbairn, 678
v. Mair, 213
Hayden, *ex parte*, 731
Haydon, *ex parte*, 729
Hayman, *ex parte*, 688, 690*, 700
Haythorne *v.* Lawson, 278
Hayward, *ex parte* (Cooke's B. L.), 694
Healey *v.* Story, 188*
Heap *v.* Dobson, 203
Heath, *ex parte*, 688
v. Hall, 718
v. Hubbard, 61
v. Percival, 243*, 253, 602
v. Sansom, 121, 169, 213*, 363, 583
Heathcote *v.* Hulme, 522, 531, 615, 616, 617
v. Livesley, 675
Heaton, *ex parte*, 143, 160*, 161, 191
Hedley *v.* Bainbridge, 131
Heilbut *v.* Nevill, 131, 172, 269*, 289, 486, 667
Helen, The, 92
Hellier, *ex parte*, 714
Helme *v.* Smith, 54, 124, 566
Helmore *v.* Smith (No. 1), 323, 358, 359, 360, 361

*Page

Helmore *v.* Smith (No. 2), 539, 554
Helsby *v.* Mears, 207
Hemings *v.* Pugh, 458
Henderson, *ex parte*, 75, 281
v. Eason, 59, 560
v. Royal British Bank, 103, 491
v. Wild, 135, 270
Hendriks *v.* Montagu, 114
Hendry *v.* Turner, 214, 426, 588
Henley *v.* Soper, 564
Henniker *v.* Wigg, 235
Hercy *v.* Birch, 476
Herkimer, The, 63
Herman *v.* Jeuchner, 106
Hermann Loog *v.* Bean, 542, 543
Hern *v.* Nichols, 148
Hernaman, *ex parte*, 255, 703
Herries *v.* Jamison, 299
Herring *v.* Walround, 92
Hesham, *ex parte*, 726, 736
Hesketh *v.* Blanchard, 28, 563
Heslin *v.* Hay, 321
Heslop, *re*, 677
Heydon *v.* Heydon, 357*
Heyhoe *v.* Burge, 12, 28, 29*, 49, 89
Heyne *v.* Middlemore, 493
Heywood *v.* Watson, 565
Hichins *v.* Congreve, 303, 313, 464, 496, 506
Hickie & Co.'s case, 713
Hickin, *ex parte*, 22, 727
Hickman *v.* Cox, 30*
Higgen's case, 255, 256
Higgins, *ex parte*, 255, 703
v. Sargent, 389
v. Senior, 192, 281
Hill, *ex parte* (3 M. & A. and 2 Deac.), 723, 745, 750*
ex parte (2 Bos. & P. N. R.), 733
(23 Ch. D.), 629
v. King, 390, 538
v. Smith, 656
Hill & Hymans, *ex parte*, 638
Hill's case (20 Eq.), 595
Hills *v.* McRae, 193, 284, 596, 597, 598, 599, 600
v. Nash, 460
Hindmarsh, *re*, 260
Hinds, *ex parte*, 324, 734
Hirsch *v.* Im Thurn, 453
Hirst *v.* Tolson, 66
Hitchcock, *ex parte*, 706
Hoare *v.* Contencin, 193
v. Dawes, 18

*Page

Hoare *v.* Oriental Bank Corporation, 111, 701
v. Peck, 509
Hobbs *v.* Wayet, 374, 375
Hobson, *re*, 675
v. Bass, 228
Hoby *v.* Roebuck, 240
Hodges *v.* London Trams Omnibus Co., 446
Hodgkin, *ex parte*, 629, 630
Hodgkinson, *ex parte*, 254, 624, 702, 704, 732
v. Mayer, 101
v. Travers, 642
Hodgson, *re* (3 A. & E.), 100
re, (31 Ch. D.), 193, 195, 257, 284, 460, 596, 597, 598, 603
ex parte (2 Bro. C. C.), 729
Hogarth *v.* Latham, 128, 130
v. Wherley, 136
Hogg *v.* Bridges, 632
v. Skene, 169
Hoggard *v.* Mackenzie, 679, 682, 684*
Holden *v.* Webber, 309
Holderness *v.* Rankin, 682
v. Shackels, 352, 355, 647, 728
Holdsworth, *ex parte*, 169, 170, 593, 604, 702
Hole *v.* Bradbury, 114, 288
v. Harrison, 376
Holford, *ex parte*, 645, 646
Holgate *v.* Shutt, 513, 514, 520
Holiday, *re*, 272
Holland *v.* King, 433
v. Teed, 118
Holliday *v.* Camsell, 562
Hollyford Mining Co., 403
Holman *v.* Johnson, 104
Holme *v.* Hammond, 32*, 34, 36, 125, 593, 604
Holmes, *ex parte*, 753
v. Bell, 256
v. Blogg, 75
v. Higgins, 23*, 24, 380, 567
v. Mentze, 358
v. Old Colony R. R. Co., 79
Holroyd *v.* Griffiths, 355
v. Holroyd, 346
Holyland *v.* De Mendez, 436*
Homfray *v.* Fothergill, 423*, 424, 479, 541*
Honduras, &c., Co. *v.* Lefevre, 501
Honduras Rail. Co. *v.* Tucker, 280, 282

	*Page
Honey, *ex parte*,	745, 748
Hood *v.* Aston,	542
Hookham *v.* Pottage,	440, 543
Hookins, *ex parte*,	709
Hooman, *ex parte*,	678
Hooper, *ex parte*,	120
v. Keay,	229
v. Lusby,	139
Hope *v.* Cust,	138
v. Meek,	634, 635
Hopkinson *v.* Smith,	100, 101, 275
Horn *v.* Baker,	677, 678, 683, 688*
v. Gilpin,	60
Hornblower *v.* Proud,	678
Hornsby *v.* Miller,	679, 682
Horrell *v.* Witts,	549
Horsfall, *ex parte*,	438
Horsley *v.* Bell,	206
v. Knighton's Patent,	62
Hort's case,	247
Hough *v.* Manzanos,	180
Houghton, *ex parte*,	324
v. Houghton,	345
Houldsworth *v.* City of Glasgow Bank,	163, 480
Houlton's case,	47, 211, 605
Houriet *v.* Morris,	73
Hovenden *v.* Annesley,	508
Howard *v.* Shaw,	491
v. Tucker,	370
Howarth *v.* Brearley,	99
Howbeach Coal Co. *v.* Teague,	315
Howden, *ex parte*,	140, 147, 324
Howe *v.* Lord Dartmouth,	620
Howell *v.* Brodie,	22*
Huber *v.* Steiner,	259
Huckey, *ex parte*,	657
Huddleston's case,	578
Hudson *v.* Forster,	651
v. Robinson,	187, 282
Hue *v.* Richards,	537
Hughes, *re* (2 Hem. & M.),	678
ex parte (4 Ch. D.),	255
v. Statham,	100
v. Sutherland,	324
v. Thorpe,	97
Hughes-Hallett *v.* Indian Mammoth Gold Mines Co.,	374, 375
Hume *v.* Bolland,	155, 165
Hunt *v.* Jessel,	291
v. Royal Ex. Assurance Co.,	139
Hunter, *ex parte* (1 Atk.),	703, 721*
(Buck),	741
(2 Rose),	646, 684*, 701
(6 Ves.),	715
Hunter *v.* Belcher,	512, 513
v. Gibbons,	259
Husbands, *ex parte*,	747
Hutcheson *v.* Smith,	380, 382, 383, 391, 537
Hutchinson *v.* Sturges,	290
v. Sydney,	290
v. Whitfield,	426, 454, 572
v. Wright,	495
Hutton *v.* Bullock,	204, 275
v. Crutwell,	629
v. Eyre,	237
v. Rossiter,	594
v. Thompson,	24
v. Upfill,	23
Hyatt *v.* Hare,	144
Hybart *v.* Parker,	458
Hyde *v.* Johnson,	261
Ibbetson, *ex parte*,	678
Ibbotson *v.* Elam,	620, 621
Ide, *re*,	626
Imbert, *ex parte*,	711
Imperial Gas Co. *v.* London Gas Co.,	259
Imperial Mercantile Credit Association *v.* Coleman,	161, 306
Indian Chief, The,	73
Inglis *v.* Haigh,	259, 510
Inman *v.* Clare,	656, 712
Innes *v.* Stephenson,	268
Ireland *v.* Livingstone,	370
Ireton *v.* Lewis,	460, 461
Irvine *v.* Young,	502
Irving *v.* Veitch,	261
Isaac, *ex parte*,	718
Isitt *v.* Beeston,	627, 681
Izard, *ex parte*,	627, 629
Jacaud *v.* French,	134, 141, 568, 569
Jackey *v.* Butler,	357
Jackson, *ex parte* (De Gex),	631
(2 M. D. & D.),	254, 705
(1 Ves. J.),	206*, 208, 705
(5 Ves.),	715
re (1 B. & C.),	100
v. Jackson,	332*, 333, 341, 346, 432
v. Litchfield,	266
v. Ogg,	510
v. Sedgwick,	409, 432, 543
v. Stanhope,	359
v. Stopherd,	563, 564
v. Wooley	263, 597
Jacobs *v.* Seward,	58, 59, 61, 568

*Page

Jacobsen *v.* Hennekinius, 84
Jacomb *v.* Harwood, 195, 250, 253, 257, 596, 602, 603
Jacques *v.* Chambers, 620
Jaffray *v.* Frebian, 74, 281
Jaggers *v.* Binnings, 128
James, *re*, 624
v. Kynnier, 631*
Jameson, *ex parte*, 709
Janes *v.* Whitbread, 30
Janson, *ex parte*, 732
Jardine *v.* McFarlane, 179
Jauncy *v.* Knowles, 482, 484
Jebsen *v.* East and West India Dock Co., 292
Jefferson, The, 669
Jefferys *v.* Agra and Masterman's Bank, 296, 656
v. Small, 341, 342
v. Smith (3 Russ.), 21, 363, 365, 366, 423, 491, 501, 583, 584
(1 J. & W.), 55, 56, 121, 553
Jekyl *v.* Gilbert, 470*
Jenkins *v.* Blizard, 222, 223
v. Morris, 186
v. Tucker, 373
Jenner *v.* Morris, 191
Jennings, *ex parte*, 690
v. Baddeley, 576*
v. Broughton, 484
v. Hammond, 102, 103
Jepson, *ex parte*, 644
Jervis *v.* White, 506, 542
Jessopp *v.* Lutwyche, 97
Jestons *v.* Brooke, 27, 564
Johnes's case (1 Mer.), 211, 605
Johns, *ex parte*, 725, 736
Johnson, *re* (15 Ch. D.), 606, 607*, 609
(3 De G. M. & G.), 653, 715
(2 M. D. & D.), 636
v. Evans, 340, 357, 358
v. Fesenmeyer, 630
v. Helleley, 440, 558
v. Hudson, 95
v. Peck, 139
v. Perens, 360
v. Pye, 74
Johnston *v.* Curtis, 514
v. Moore, 621
Joll *v.* Lord Curzon, 280
Jombart *v.* Woolett, 673
Jones's case (15 Jur.), 704
Jones, *ex parte* (18 Ch. D.), 75, 624
(10 Ch.), 709
(4 M. & S.), 324

*Page

Jones *v.* Beach, 193, 196
v. Broadhurst, 226
v. Charlemont, 491
v. Clayton, 299
v. Corbett, 169
v. Dwyer, 681
v. Foxall, 523, 531, 615
v. Gibbons, 651, 678
v. Harber, 628, 631
v. Herbert, 145
v. Lloyd, 426, 572, 577, 579
v. Maund, 233*
v. Noy, 77, 520, 577*
v. Ogle, 621
v. Pengree, 508
v. Peppercorne, 656
v. Shears, 113
v. Walker, 607
v. Welch, 579
v. Yates, 269
Jordan *v.* Money, 480
Josephs *v.* Pebrer, 370
Joy *v.* Campbell, 108, 652, 677, 682, 683
Joyce, *ex parte*, 100
Juggeewundas Keeka Shah *v.* Ramdas Brijbooken Das, 139

Kaltenbach *v.* Lewis, 140
Kay *v.* Johnston, 51, 60, 180, 355
Keating *v.* Marsh, 155
Keay *v.* Fenwick, 248, 254, 257, 704, 718
Keble *v.* Thompson, 161
Kedie, *ex parte*, 254, 704
Kell *v.* Nainby, 276
Kellock's case, 602
Kellock *v.* Enthoven, 708
Kelly & Co., *ex parte*, 630
v. Hutton, 364
Kemble *v.* Mills, 417*
Kemp, *ex parte*, 678
v. Andrews, 288, 341
v. Balls, 226
Kemptner, *re*, 338, 574, 698, 699
Kendal *v.* Wood, 136, 166, 172, 269
Kendall, *ex parte*, 250, 254, 603, 732
v. Hamilton, 193*, 255, 598, 703, 732, and Add. to p. 193
Kennedy, *ex parte*, 733
v. Lee, 440, 447, 549
Kensington, *ex parte* (2 V. & B.), 119, 120
(14 Ves.), 731
Kent *v.* Jackson, 314, 512

	*Page
Kerridge *v.* Hesse,	206
Kerrison *v.* Reddington,	113
Kershaw *v.* Matthews,	429, 434, 548, 555, 573
Kewney *v.* Attrill,	300, 554
Key *v.* Flint,	656
Kibble, *ex parte*,	704
Kiffin *v.* Evans,	237
Kilgour *v.* Finlyson,	190, 215, 218
Killock *v.* Greg,	284, 460, 493
Kilner, *ex parte*,	628
Kilshaw *v.* Jukes,	31*, 203, 204, 205
King, *ex parte*,	728, 742
v. Accumulative Assurance Co.,	121
v. Chuck,	410*, 430, 479
v. Hoare,	255, 256
v. Smith,	134
Kingsbridge Flour Mill Co. *v.* Plymouth Grinding and Baking Co.,	189, 190
Kingston, *ex parte*,	659
Kinnaird *v.* Webster,	227, 230
Kinnerley *v.* Hossack,	292, 294, 661
Kinsman *v.* Barker,	514
Kipling *v.* Turner,	117
Kirby, *ex parte*,	254, 705
v. Carr,	578, 579*
v. Duke of Marlborough,	227
v. Wilson,	268
Kirk, *ex parte*,	113
v. Blurton,	115, 184, 185*
Kirkman *v.* Booth,	612, 615
Kirkwood *v.* Cheetham,	41
Kirwan *v.* Kirwan,	246*, 253
Kitchin *v.* Wilson,	272
Kitson *v.* Hardwick,	652
Knapman, *re*,	364
Knebell *v.* White,	494, 497
Knight *v.* Majoribanks,	485*
Knowles *v.* Haughton,	97, 105, 498
Knox *v.* Bushell,	191
v. Gye,	508, 510*, 617
Knudson *v.* Pybus,	114
Krehl *v.* Great Central Gas Co.,	675
Kynaston *v.* Crouch,	663, 665
Labouchere *v.* Tupper,	28, 604, 606
v. Dawson,	440
v. Wharncliffe,	466
Lacey *v.* Hill,	143, 236, 375, 599, 734, and Add. to p. 143
Lackington *v.* Combes,	663
Lacy *v.* Kynaston,	225, 237
v. McNeile,	136
Lacy *v.* Woolcott,	212, 667*
Ladbrooke, *ex parte*,	750*
Laing *v.* Campbell,	228, 421, 490, 513
Laird *v.* Chisholm,	523, 524
Lake *v.* Argyle,	44*, 89, 90
v. Craddock,	341, 342, 471*
v. Gibson,	51, 341, 342
Lambert's case,	146
Lambert *v.* Rendle,	615
Lampon *v.* Corke,	238
Lancaster Canal Co., *ex parte*,	683
Lane, *ex parte*,	119, 706
v. Sterne,	554
v. Williams,	131, 169, 188, 194, 596
Lanesborough *v.* Jones,	658, 660
Lanfear, *ex parte*,	729, 742*
Langdale, *ex parte*,	12, 30
Langley *v.* Oxford,	494
Langmead's Trusts, *re*,	140, 354*, 355, 451*
Langmead, *re*,	679
Lascaridi *v.* Gurney,	137
Last *v.* London Ass. Corp.,	394
Latch *v.* Wedlake,	137
Latouche *v.* Waley,	112
Law, *ex parte* (3 Deac. and Mon. & Ch. 111),	182, 702, 747
(Mon. & Ch. 590),	739
v. Garrett,	453
v. Law,	613
v. Parnell,	274
Lawes *v.* Lawes,	402, 409, 432*
Lawless *v.* Sullivan,	394
Lawrence, *re*,	152
v. Bowle,	162
Laws *v.* Rand,	133
Lawson *v.* Morgan,	466, 543, 544, 549
Leaf, *ex parte* (1 Deac.),	685
(Mon. & Ch.),	688
(4 Deac.),	700
v. Coles,	557*, 577
Leak *v.* McDowell,	113
Leake *v.* Young,	628
Leary *v.* Shout,	581
Lee, *re*,	624
v. Haley,	114
v. Hart,	629
v. Page,	66, 68
Lees, *ex parte* (1 Deac.),	75
(16 Ves.),	642
v. Jones,	55, 56, 553, 557, 571
v. Laforest,	303, 449, 591

*Page

Lees *v.* Smith, 97, 105
Leese *v.* Martin, 272
Lesson *v.* Holt, 222
Le Fanu *v.* Malcolmson, 279
Lefevre *v.* Boyle, 277
Lefroy *v.* Gore, 367, 368, 382, 385, 386
Leggott *v.* Barrett, 440
Leicestershire Banking Co., *ex parte*, 717
Leiden *v.* Lawrence, 90, 134
Leigh's estate, *re*, 508
Leigh *v.* Birch, 613
v. Dickeson, 60
Leighton *v.* Wales, 563
Lemere *v.* Elliott, 209
Lempriere *v.* Lange, 75
Le Neve *v.* Le Neve, 141
Lennox, *ex parte*, 703
Leslie, *re*, 60, 355, 372
Letts and Steer, *ex parte*, 386*, 387
Leveck *v.* Shafto, 276
Leverson *v.* Lane, 171, 172
Levett, *ex parte*, 670
Levey, *re*, 742
Levi & Co's. case, 714
Levy *v.* Pyne, 131
v. Walker, 445, 446, 447
Lewis *v.* Armstrong, 99
v. Bright, 71
v. Edwards, 449, 567, 569
v. Langdon, 93, 217, 443, 445*
v. Nicholson, 163, 282
v. Reilly, 129, 131, 169, 215, 216*, 220
v. White, 672
Liardet *v.* Adams, 580
Lickbarrow *v.* Mason, 652
Liddel, *ex parte*, 746
Limpus *v.* London General Omnibus Co., 148, 150
Lindo *v.* Lindo, 238
Lindon *v.* Sharp, 627
Lindsay *v.* Gibbs, 61, 355, 364
Lingard *v.* Bromley, 377, 387
Lingen *v.* Simpson, 339, 355, 451, 479
Lingood *v.* Eade, 454
Lister, *ex parte*, 642, 644
Littledale, *ex parte*, 681
Littles, *re*, 322, 706
Littlewood *v.* Caldwell, 544
Liverpool Adelphi Loan Association *v.* Fairhurst, 77
Liverpool Borough Bank *v.* Turner, 324
v. Walker, 195, 257, 603, 604

*Page

Livingston *v.* Ralli, 451
Llewellen, *ex parte*, 754
Lloyd, *ex parte* (1 G. & J.), 119
(1 Mon. & Ayr.), 140
(3 Mon. & Ayr.), 717
v. Archbowle, 276
v. Ashby, 180, 186
v. Banks, 680
v. Blackburne, 117
v. Dimmack, Add. to p. 375
v. Freshfield, 131, 168, 190, 721
v. Loaring, 5, 50, 301, 463
Lobb, *ex parte*, 254, 704
Lock *v.* Lynam, 311*
v. Venables, 621
Lockett *v.* Lockett, 502, 508
Loder's case, 713
Lodge and Fendal, *ex parte*, 633, 725, 734, 735*, 739
Lodge *v.* Dicas, 242*, 243, 253
v. Prichard, 536, 537, 599, 692
Lomas, *ex parte*, 754
Lomax *v.* Buxton, 629
London Assurance Co. *v.* Bold, 318
Birmingham and Bucks Railway Co., *re*, 538
Bombay and Med. Bank *v.* Narraway, 654
Brighton & S. C. Ry. *v.* Goodwin, 118
Financial Association *v.* Kelk, 54, 421
India Rubber Co., 402
& N. W. Ry. Co. *v.* McMichael, 75, 76
& Southern Counties Freehold Land Co., *re*, 315
Syndicate *v.* Lord, 506
Long *v.* Yonge, 460, 461
Longman *v.* Pole, 279
v. Tripp, 678
Longworth's Executor's case, 91, 104, 109, 379*
Loring *v.* Davies, 371
Loscomb *v.* Russell, 494, 497
Lovegrove *v.* Nelson, 13, 365*
Lovell *v.* Hicks, 49, 164*, 167
Lovering, *ex parte*, 680
Low *v.* Routledge, 115
Lowe *v.* Copestake, 274
Loyd, *ex parte*, 120
Lucas *v.* Beach, 23*, 24, 567
v. De la Cour, 277
v. Wilkinson, 226
v. Williams, 604

*Page

Luckie *v.* Bushby, 290
v. Forsyth, 486
Luckombe *v.* Ashton, 50, 51
Luff *v.* Horner, 338
Luke *v.* South Kensington Hotel Co., 267
Lury *v.* Pearson, 453
Lyon *v.* Haynes, 218*, 219, 565, 569, 586
v. Knowles, 18, 54
v. Tweddell, 69, 583
Lysaght *v.* Walker, 234
Lyster *v.* Dolland, 341
Lyth *v.* Ault, 241

Maberly, *ex parte*, 635
McBirney *v.* Harran, 274
Macbride *v.* Lindsay, 491
McClean *v.* Kennard, 19, 559
McConnell *v.* Hector, 73, 634
McCrae, *re*, 193, 597, 598
MacDonald *v.* Richardson, 461, 524, 530*, 612, 617
McGae, *ex parte*, 673*
McGillivray *v.* Simson, 292
McGregor *v.* Bainbridge, 49, 83, 84, 348, 350
Machel, *ex parte*, 732
v. Kinnear, 274
MacIlreath *v.* Margetson, 382, 387
McIntyre *v.* Belcher, 436
v. Miller, 225, 226
McIver *v.* Humble, 85, 222
Mackay, *re*, 454
v. Commercial Bank of New Brunswick, 163
McKay *v.* Rutherford, 81
Mackenna, *ex parte* (3 De G. F. & J.), 119
(7 Jur. N. S.), 715
v. Parkes, 67, 492
Mackenzie, *ex parte*, 640, 644
McKewan's case, 376
Mackey, *ex parte*, 653
Maclae *v.* Sutherland, 130, 187
Maclaren *v.* Stainton, 394
Maclean *v.* Dawson, 611
McLure *v.* Ripley, 304, 471, 485
McMahon *v.* Burchell, 59
v. Upton, 463
McManus *v.* Crickett, 148
M'Nair *v* Fleming, 184
McNeill's case, 490
M'Neill *v.* Reid, 559
McNeillie *v.* Acton, 609, 610

*Page

McOwen *v.* Hunter, 386
McRae, *re*, 613
Maddeford *v.* Austwick, 303, 304, 486
Maddick *v.* Marshall, 42, 45
Madgwick *v.* Wimble, 433, 434, 553, 555, 573
Magdalena Steam Navigation Co. *v.* Martin, 72, 191, 390
Mahony *v.* East Holyford Mining Co., 166
Mainwaring *v.* Newman, 116, 567, 568, 569
Mair *v.* Glennie, 10, 19, 29*
Malcolmson *v.* Malcolmson, 186
Manchester Bank, *ex parte*, 337, 688, 699
and County Bank, *ex parte*, 716, 740
and Liverpool District Banking Co., *ex parte*, 716
and Milford Rail. Co., 545
, Shef., and Lincoln Railway Co. *v.* Brooks, 294
Manderston *v.* Robertson, 261
Mann's case, 75
Manning *v.* Westerne, 227
Mansell *v.* Feeney, 507, 508
Mant *v.* Mainwaring, 88
March *v.* Ward, 187
Mardall *v.* Thelusson, 290
Mare *v.* Charles, 186
Mariott *v.* Shaw, 357
Marks, *ex parte*, 433
v. Feldman, 629, 631
Marlin, *ex parte*, 695
Marlow *v.* Pitfield, 191
Marquand *v.* New York Manufactory Co., 584
Marsden *v.* Moore, 417
Marsh, *ex parte*, 120
v. Keating, 151, 155*, 157, 159, 165
Marshall *v.* Colman, 301, 413, 466, 543, 580
v. Maclure, 363
v. Marshall, 571
v. Rutton, 77
v. Watson, 542
Marshfield, *re*, 537
Marston, *ex parte*, 739
Martin's case, 98
Martin, *ex parte*, 683, 687
v. Crompe, 288, 341
v. Heathcote, 509
v. O'Hara, 639

*Page

Martineau *v.* Cox, 503
Martyn *v.* Gray, 42, 44, 45
v. Knowllys, 59, 562
Mason or Rawson, *ex parte* (1 Rose, 428), 641
Massam *v.* Thorley's Cattle Food Co., 114
Masson, *ex parte* (1 Rose, 159), 640, 746
v. Bogg, 602
v. Haddan, 452
v. Rumsey, 186
Master *v.* Kirton, 491
Masterman *ex parte*, 681
Mather, *ex parte*, 108
v. Fraser, 629, 678
v. Lay, 677
Mathers *v.* Green, 62
Mathewman's case, 78
Mathews *v.* Aland, 729
Matson *v.* Swift, Add. to p. 347
Matthews, *ex parte*, 40, 89, 637
Matthison *v.* Clark, 268
Maturin *v.* Tredinnick, 490
Maude, *ex parte* (2 Ch.), 721, 727, 738, 742
(6 Ch.), 403
Maudslay *v.* Le Blanc, 87, 89
Maughan *v.* Sharpe, 93, 112
Maund *v.* Allies, 413
Mavor, *ex parte*, 633
Mawman *v.* Gillett, 276
Maxwell *v.* Greig, 284
v. Hogg, 114
v. Jameson, 374
v. Port Tennant Co., 476
May, *ex parte*, 737
v. Smith, 223
Mayberry *v.* Brooking, 113
Mayhew's case, 366
Mayhew *v.* Eames, 141
v. Herrick, 61, 358, 562, 568*, 569, 676
Mayou, *ex parte*, 338, 698
Medewe's trust, 230
Megarey, *ex parte*, 738
Meggy *v.* Imperial Discount Co., 756
Megrath *v.* Gray, 238
Meinhertzhagen, *ex parte*, 254, 704
Melbourne, *ex parte*, 646
Meliorucchi *v.* Royal Exchange Assurance Co., 354
Mellersh *v.* Keen, 381, 440, 443, 444, 527, 528, 571, 572, 579
Melliss *v.* Shirley Local Board, 95

*Page

Mellors *v.* Shaw, 149
Mercantile Mutual Marine Insurance Co., *re*, 708
Mercer, *ex parte*, 627, 629, 654
Meredith, The, 380
Merriman *v.* Ward, 229, 230, 235, 597
Merryweather *v.* Nixan, 370, 377
Mersey Steel and Iron Co. *v.* Naylor & Co., 658
Mertens *v.* Haigh, 505
Metcalf *v.* Bruin, 117
v. Rycroft, 112, 273
Metropolitan Saloon Omnibus Co. *v.* Hawkins, 278
Meyer, *ex parte*, 169
v. Sharpe, 15, 328, 671
Meymott *v.* Meymott, 391
Michell *v.* Harris, 514
Middleton *v.* Pollock, 292, 662
Milburn *v.* Codd, 567
Miles' claim (9 Ch.), 180, 182, 183*
ex parte (2 Rose), 645
v. Thomas, 540, 571
Milford *v.* Milford, 514, 520
Millar *v.* Craig, 389, 489*, 513, 514, 516, 517, 537
Miller *v.* Douglas, 171
v. Mackay, 309, 311, 380
v. Miller, 510
v. Mynn, 299
Milliken *v.* Milliken, 433
Mills, *ex parte* (6 Ch.), 290
(8 Ch.), 36, 37
v. Bennett, 632, 633*
v. Fowkes, 227
v. Hanson, 505
Milne *v.* Bartlet, 579
Milner, *ex parte*, 642
Minchin, *ex parte* (2 Gl. & J.), 730
(Mont. & McAr.), 754
Minnitt *v.* Lord Talbot, 50
v. Whiney or Whitney, 170, 175, 215
Mitchell's case (6 Ch.), 260, 511
ex parte (13 Ves.), 624
v. Cockburn, 97, 105
v. Cullen, 226
v. Lapage, 186, 286
v. Reynolds, 437
v. Tarbutt, 198, 283
Moffatt *v.* Farquharson, 309, 326, 460, 461
v. Van Millingen, 568, 569
Moller *v.* Lambert, 112
Molton *v.* Camroux, 76, 213

*Page

Mollwo, March & Co. *v.* The Court of Wards, 2, 10, 17, 33*, 34, 35, 36, 38
Monkhouse *v.* Hay, 678
Monro, *ex parte*, 679
Montefiore *v.* Lloyd, 118
Moody *v.* King, 741
Moon, *ex parte*, 755
Moore, *ex parte*, 738, 741
v. Barthrop, 653
v. Davis, 10, 11
Moor *v.* Hill, 287
Morans *v.* Armstrong, 124, 135, 169
Moravia *v.* Levy, 564
Morehouse *v.* Newton, 537
Moreton *v.* Hardern, 149
Morgan's case, or Morgan, *ex parte*, 314
Morgan *v.* Hardy, 708, 751
v. Knight, 639
v. Marquis, 61, 212, 218, 568, 569, 672*, 676
v. Rowlands, 260
Morier, *ex parte*, 659, 660
Morison *v.* Moat, 415, 479, 543
v. Thompson, 307
Morley, *ex parte*, 327, 337, 353, 699
v. Baker, 564
v. Newman, 454
v. Strombom, 271, 357
v. White, 599, 649
Morris, *ex parte* (10 Jur.), 642
(Mon.), 753
v. Barrett, 322, 323, 331*, 341
v. Colman, 541*, 546
v. Harrison, 512
v. Kearsley, 344*, 479
v. Livie, 364
v. Morris, 490
Morrison, *ex parte*, 315
Morrow *v.* Saunders, 559
Morse *v.* Wilson, 16
Moss, *ex parte*, 715
Mosse *v.* Salt, 513
Motion, *re*, 649, 652
Moufflet *v.* Cole, 437
Moulston *v.* Wire, 272
Mowatt and Elliott's case, or Mowatt, *ex parte*, 386
Moxon *v.* Bright, 458
Mulford *v.* Griffin, 213
Mullett *v.* Hook, 281
Mullins *v.* Collins, 149
Munnings *v.* Bury, 495
Munster *v.* Cox, 266, 272

*Page

Munster *v.* Railton, 266
Munton, *ex parte*, 639
Murray *v.* Flavell, 85, 434, 435, 479
v. Moore, 272
v. Pinkett, 584
v. Somerville, 187
v. Walter, 503*, 504*
Murtagh *v.* Costello, 346
Murton, *ex parte*, 328, 633, 684, 700
Musgrave *v.* Drake, 169
Musson *v.* May, 451, 591
Mutton, *re*, 751
Mycock *v.* Beatson, 484*
Myers *v.* Edge, 118
v. Willis, 147

Nanson *v.* Gordon, 692, 722
Nash, *ex parte*, 636
v. Hodgson, 227
National Bank, *ex parte*, 140
Bolivian Navigation Co. *v.* Wilson, 576
Funds Assurance Co., *re*, 200
Permanent Benefit Building Soc., - 191
Natusch *v.* Irving, 316*, 317*, 318*, 319
Navulshaw *v.* Brownrigg, 140
Naylor *v.* Mortimore, 645
Neale *v.* Turton, 116, 565, 567, 569
Neave *v.* Avery, 562
Neilson *v.* Mossend Iron Co., 122, 410, 411, 413, 429, 571
Nelson *v.* Bealby, 340, 406
v. Cherrell, 639
Nerot *v.* Burnand, 84, 323, 326*, 327, 353, 583, 588
Nesbit *v.* Smith, 375
Nesbitt *v.* Howe, 282
Nettleship, *ex parte*, 119
Newbigging *v.* Adam, 369, 481, 484*
New Brunswick Railway Co. *v.* Muggeridge, 480
Newell *v.* Townsend, 359, 542
Newen *v.* Wetten, 514, 520
Newland *v.* Champion, 613
Newman *v.* Jones, 149
Newmarch *v.* Clay, 229, 234
Newry and Enniskillen Railway Co. *v.* Coombe, 75
v. Moss, 584
New Sombrero Phosphate Co. *v.* Erlanger, 480, 595, 596
Newsome *v.* Coles, 43*, 45, 46, 217, 222, 588

*Page

Newton *v.* Belcher, 88, 207
v. Chantler, 628
v. Liddiard, 88
v. Taylor, 518
New York Life Insurance Co. *v.* Statham, 72
Nicholas, *ex parte*, 740
Nicholls *v.* Diamond, 186
v. Dowding, 84, 86*, 128
Nicholson *v.* Revill, 224
v. Ricketts, 125, 131, 182
Noke *v.* Ingham, 224
Nokes, *ex parte*, 571, 635
Nolan *v.* Fritzgerald, 272
Nolte, *ex parte*, 732
Norfolk, *ex parte*, 702, 732
Norris *v.* Cottle, 24
North British Insurance Co. *v.* Hallett, 680
Northumberland *v.* Todd, 117
Norton, *ex parte*, 628, 629
v. Cooper, 152
v. Russell, 517
v. Seymour, 86*, 89, 185*,
Norway *v.* Rowe, 469*, 475, 553*
Norwich & Lowestoft Co. *v.* Theobald, 222
Yarn Co.'s case, The, 375
Noteley, *ex parte*, 16, 564, 635*
Nottidge *v.* Prichard, 225, 228, 236, 294
Nottingham, *ex parte*, 78, 701, 730
Nottingham Bank, *ex parte*, 680
Nowell *v.* Nowell, 403
Noyes *v.* Crawley, 509, 510*, 511
Nutting, *ex parte*, 680

Oakeley *v.* Pasheller, 248, 251*, 254, 450, 597
Oakes *v.* Turquand, 480
Oakford *v.* European and American Steam Ship Co., 244*, 252, 253
O'Brien *v.* Cooke, 541
Ockenden, *ex parte*, 658
Odell *v.* Cormack, Add. to p. 180
Official Receiver, *ex parte*, *re* Gould, Add. to p. 628
Ogilvy, *ex parte*, 737
Ogle, *ex parte*, 720
Oldaker *v.* Lavender, 377, 407, 421
Oldfield *v.* Preston, 594
Olive *v.* Smith, 656
Oliver *v.* Hamilton, 546
Olknow, *ex parte*, 729
O'Mealey *v.* Wilson, 73

Page

Omychund *v.* Barker, 390
Ord, *ex parte*, 683
v. Portal, 274, 285
O'Reardon, *ex parte*, 640*, 641
O'Reilly *v.* Richardson, 180
Oriental Banking Co. *v.* Coleman, 627
Oriental & Commercial Bank, *re*, 374, 375
Financial Corporation, *ex parte*, 255
Orr *v.* Chase, 137, 194, 283, 596
Osborne *v.* Jullion, 20
v. Harper, 564
v. Harpur, 566
Oswald *v.* Thompson, 631
Other *v.* Iveson, 193, 196
Ottley *v.* Browne, 108*
Owen, *ex parte* (4 De G. & Sm.), 328, 329*, 334, 337*, 700
(13 Q. B. D.), 626, 634, 669, 670
v. Body, 30
v. Delamere, 47, 606, 609
v. Homan, 255
v. Van Uster, 87, 186*
v. Wilkinson, 294
Owston *v.* Ogle, 563
Oxford Benefit Building Society, *re*, 161, 199

Pachelor, *ex parte*, 640, 645
Paddon *v.* Richardson, 618
Padstow Total Loss Association, 102
Page, *ex parte*, 635, 729
v. Cox, 85, 433, 434*, 435, 479
v. Newman, 389
Paice *v* Walker, 177, 180
Paley *v.* Field, 227
Palliser *v.* Gurney, 78
Palmer's case (1 Mer.), 250, 253, 596
Palmer, *re* (2 A. & E.), 101
v. Justice Assurance Society, 137
v. Mallet, 437, and Add. to p. 267
v. Mitchell, 523, 615, 617
Panama and South Pacific Tel. Co. *v.* India Rubber Co., 481
Pannell *v.* Hurley, 162
Pardo *v.* Bingham, 258
Pare *v.* Clegg, 92, 260, 464
Pariente *v.* Lubbock, 113, 117
Parker, *ex parte* (Cooke's B. L.), 695, 721
(2 M. D. & D.), 208, 706
v. Bloxham, 514, 618

	*Page
Parker *v.* Gossage,	425
v. Hills,	307, 329
v. McKenna,	200, 306
v. Morrell,	129
v. Pistor,	357, 359
v. Ramsbottom,	573, 741
v. Wells,	508
Parkes, *ex parte*,	636
Parkin *v.* Carruthers,	214, 221
Parkinson *v.* Hanbury,	514
Parr, *ex parte* (4 D. & Ch.),	120
(18 Ves.),	644
(1 Rose),	715
Parry, *ex parte*,	681
Parsons *v.* Hayward,	517, 527, 571
Part, *ex parte*,	695
Pascoe *v.* Swan,	59
Patent File Co.,	140
Paterson *v.* Gandasequi,	177
v. Zachariah,	215
Patten *v.* Rea,	148
Pawsey *v.* Armstrong,	10, 14, 330, 385*, 443, 555, 558
Payler *v.* Homersham,	238
Payne, *ex parte* (De Gex),	635
(11 Ch. D.),	627
v. Hornby,	326, 353, 588, 632
Paynter *v.* Houston,	601, 612
Peaceable *v.* Read,	562
Peacock, *ex parte*,	716
v. Peacock,	84, 217, 301, 348, 349, 540, 551, 552, 571
Peake, *ex parte* (1 Mad.),	335, 336, 485, 486, 573, 698
(2 Rose),	732
Pearce *v.* Chamberlain,	363, 433, 590, 591
v. Lindsay,	572
v. Slocombe,	720
Pearl *v.* Deacon,	228
Pearson, *ex parte*,	629
v. Pearson,	440
v. Scott,	136
v. Skelton,	378, 566
Pease *v.* Hewitt,	68, 69, 581
v. Hirst,	117, 227, 274
Peat, *ex parte*,	642
v. Jones,	658
Pedder *v.* Mayor of Preston,	290
Pedgrift *v.* Chevallier,	99
Peek *v.* Gurney,	410, 480, 595
Peel *v.* Thomas,	90
Peele, *ex parte*,	190, 208, 703, 705
Peirse *v.* Bowles,	136
Pelly *v.* Wathen,	129

D

	*Page
Pemberton, *ex parte* (1 M. D. & D.),	640
ex parte (1 Deac.),	687
v. Oakes,	118, 230, 234
Penkivil *v.* Connell,	188*
Pennell *v.* Dawson,	629
v. Deffell,	162, 228
v. Reynolds,	629
v. Walker,	453
Penney *v.* Goode,	504
Penny *v.* Pickwick,	475
Penoyer *v.* Brace,	298
Perens *v.* Johnson,	303, 304, 360*, 391, 493
Perfect, *ex parte*,	713
Perring *v.* Hone,	130, 567, 568, 569
Perrott *v.* Bryant,	19
Perry *v.* Barnett,	370, 372
v. Jackson,	258
v. Walker,	636
Peter *v.* Rich,	376
Peters *v.* Anderson,	226, 227
Petre *v.* Petre,	260
Petrie *v.* Hannay,	105
Pettman *v.* Keble,	372
Petty *v.* Smith,	272
Pettyt *v.* Janeson,	408, 409, 429, 430*, 573
Pharmaceutical Soc. *v.* The London and Provincial Supply Assoc.,	6, 98, 99
Phelps *v.* Lyle,	274, 276
v. Prothero,	275
v. Sproule,	516
Phelps, Stokes & Co. *v.* Comber,	711
Phené *v.* Gillan,	374
Philips *v.* Atkinson,	542, 549
v. Knightley,	454
v. Philips,	284, 342
Phillips, *ex parte*,	681, 682
v. Clagett,	145*, 146
v. The Commissioners of Inland Revenue,	450
v. Homfray,	595
v. Hopwood,	639
v Hunter,	676
v. Phillips (1 M. & K.),	331, 352* 344*, 347
v. Phillips (Finch.),	616
v. Phillips (3 Hare),	134
v. Ward,	255
Phillpotts *v.* Jones,	227
Philps *v.* Hornstedt,	629
Phipps, *ex parte*,	636
Phœnix Life Insurance Co., The,	163

*Page

Phosphate of Lime Co. *v.* Green, 149
Phosphate Sewage Co. *v.* Hartmont, 490
Pickard *v.* Sears, 40
Pickering's case, 177
Pickering *v.* Pickering, 502, 537
v. Rigby, 503
Pidgeon *v.* Burslem, 97
Piercy *v.* Fynney, 136, 267, 270, 294
v. Young, 453
Pigott *v.* Bagley, 433
Pile *v.* Pile, 439
Pilians *v.* Harkness, 369, 482*, 517
Pilley *v.* Robinson, Add. to p. 264
Pilling *v.* Pilling, 329, 334, 390, 409
Pim *v.* Harris, 389
v. Wilson, 636
Pinckney *v.* Hall, 129
Pinder *v.* Wilks, 218
Pine, *ex parte*, 721
Pinkerton, *ex parte*, 732
Pinkett *v.* Wright, 584, 652, 680
Pitt *v.* Cholmondeley, 513
Plews *v.* Baker, 453
Plowden, *ex parte*, 741
Plumer *v.* Gregory, 132, 151, 156*, 250, 284
Plummer, *re*, 716
Pointon *v.* Pointon, 612
Pollexfen *v.* Sibson, 266
Ponton *v.* Dunn, 434*, 435
Poole, *ex parte*, 642
Pooley *v.* Driver, 4, 10, 11, 12, 16, 17, 33, 34, 35, 36, 38*
Pope *v.* Haman, 357
Popple *v.* Sylvester, 255
Poppleton, *ex parte*, 102
Pordage *v.* Cole, 416*
Porter *v.* Lopes, 59
v. Taylor, 134
Porthouse *v.* Parker, 141
Portland, The, 73
Pott *v.* Eyton, 28, 30*, 43, 89
Potter *v.* Commissioners of Inland Revenue, 439, 450
v. Jackson, 402, 518
Potts *v.* Bell, 72
Poulson, *ex parte*, 161, 162, 702
Powdrell *v.* Jones, 419*
Powell, *ex parte*, 753
v. Head, 62
v. Layton, 280
Powis *v.* Harding, 491
Powles *v.* Page, 141
v. Hargreaves, 713

*Page

Prance *v.* Sympson, 260, 509, 511
Prendergast *v.* Turton, 469*, 470, 475
Prentice *v.* Prentice, 557
Prescot, *ex parte* (1 Atk.), 658
Prescott, *ex parte* (Mon. & Ch.), 739
(4 D. & C.), 714
Preston *v.* Strutton, 543, 564, 565
Price, *ex parte*, 659
v. Barker, 237
v. Groom, 21*, 30, 681
v. Hewitt, 74
v. Moulton, 255
Prickett *v.* Down, 668
Priestly *v.* Pratt, 677, 679, 682
Primrose *v.* Bromley, 194
Pritchard *v.* Draper, 128, 225
Pritt *v.* Clay, 513, 516
Professional Life Assurance Co., 377
Prole *v.* Masterman, 382, 495*
Proudfoot, *ex parte*, 639
Puller *v.* Roe, 296
Pulling *v.* Tucker, 631
Pulsford *v.* Richards, 480, 481
Punnett, *ex parte*, 439

Quartermaine *v.* Bittleston, 677
Quincey *v.* Sharp, 260
Quintin, *ex parte*, 655, 660

Raba *v.* Ryland, 140
Rackstraw *v.* Imber, 564
Radcliffe *v.* Rushworth, 13, 88
Radenhurst *v.* Bates, 285, 457, 563
Raikes *v.* Todd, 228
Raleigh, *ex parte*, 254, 704, 706
Ralph *v.* Harvey, 87, 89
Ramazotti *v.* Bowring, 295
Ramsbotham *v.* Cator, 673
Ramsbottom *v.* Duck, 673
v. Lewis, 667, 673
v. Parker, 485, 486
Ramskill *v.* Edwards, 377, 707
Randall *v.* Randall, 343*, 346, 347
v. Raper, 374
Randegger *v.* Holmes, 453
Randell, Saunders & Co. *v.* Thompson 452
Randleson, *ex parte*, 228
Ranelagh *v.* Hayes, 375 and Add. to p. 375
v. Melton, 424
Ransford *v.* Copeland 96
Rapp *v.* Latham, 146, 164*, 165
Rasbotham *v.* Shropshire Union Railway Co. 503

	*Page
Rathbone *v.* Drakeford	272
Ravenscroft, *ex parte*,	641, 642
Rawbone, *re*,	679
Rawlings *v.* Lambert,	592
Rawlins *v.* Wickham,	257, 369, 483*
Rawlinson *v.* Clarke,	13, 563
v. Moss,	120
Rawson, *ex parte* (1 V. & B.),	640
(1 Rose),	641
(Jac.),	721, 724, 737
v. Samuel,	291, 543
Rawstone *v.* Parr,	193, 196
Ray *v.* Davies,	289, 647
Raymond's case,	450, 493
Raynard *v.* Chase,	95
Read, *ex parte*,	718
v. Anderson,	371
v. Bailey, 734 and Add. to p.	143
v. Bowers,	542, 547
Reade *v.* Bentley,	14, 122*
v. Woodrooffe,	508
Redgrave *v.* Hurd,	163, 481
Redmayne *v.* Forster,	364, 366, 461, 494, 498
Redpath *v.* Wigg,	30
Redway *v.* Sweeting,	51
Reed and Bowen, *ex parte*,	754
and Steele, *ex parte*,	629
v. White,	243, 248*, 253, 255
Reese River Mining Co. *v.* Smith,	491
Reeve, *ex parte*,	720, 721, 728, 742
v. Whitmore,	537
Reid's case (24 Beav.),	12
Reid, *ex parte* (2 Rose),	695, 728
v. Hollinshead,	13, 49, 53, 140
v. Langlois,	504
Reilly *v.* Walsh,	304, 341, 471*
Rennick, *ex parte*,	640
Rensburg, *ex parte*,	678
Revell, *ex parte*,	703
R. *v.* Arnaud,	325
v. Atkinson,	457
v. Bren,	457
v. Burgess,	457
v. Collector of Customs,	342
v. Essex,	372
v. Evans,	457
v. Fox,	100
v. Frankland,	103
v. Gaby,	288
v. Hodge,	340
v. Leech,	147
v. Loose,	457
v. Macdonald,	13, 495
v. Manning,	147
R. *v.* Marsh,	457
v. Proud,	457
v. Robson,	2, 50, 457
v. Rock,	340
v. St. Martin's,	117
v. Sanderson,	340
v. Scott,	288
v. Smith,	457
v. Stainer,	91
v. Stranyforth,	149
v. Warburton,	457
v. Webster,	457
v. Whitmarsh,	50, 93
Reynell *v.* Lewis,	44, 89
Reynolds *v.* Bowley,	690*, 691
v. Bridge,	438, 455
Rheam *v.* Smith,	501, 543
Rhodes *v.* Forwood,	436
v. Rhodes,	391*
v. Smethurst,	259
Rice *v.* Gordon,	488, 489*, 597, 600, 601
Richards *v.* Davies,	497
v. Heather,	288
Richardson, *ex parte* (3 Deac. & Ch.),	635*
(Buck, 202, 3 Madd.),	609, 707
(Mon. & Ch.),	689
(Buck, 480),	682
v. Bank of England,	111, 115, 401, 402, 505, 568
v. Gooding,	647
v. Hastings,	460, 461, 462, 463, 499
v. Horton,	196
v. Larpent,	462
Riches, *re*,	129, 171, 172
Richmond *v.* Heapy,	268, 269
Ricketts *v.* Bennett,	127, 132, 133, 190
Ridgway *v.* Clare,	599, 601*
v. Philip,	49, 88*
Ridler, *re*,	654
Ridley *v.* Taylor,	169, 172
Ridout *v.* Brough,	659
Rigden *v.* Pierce,	429, 555
Right *v.* Cuthell,	139
Ring, *ex parte*,	725
Ripley *v.* Waterworth,	344*
Rishton *v.* Grissell,	390, 393, 493, 555
Roberts, *ex parte*,	640
v. Eberhardt,	56, 57, 331, 545*, 550, 552, 580
v. Hardy,	73
v. Kuffin,	514
Robertson *v.* Lockie,	425, 572, 579

*Page

Robertson *v.* Quiddington, 439, 445, 619
v. Southgate, 388, 459
Robey & Co.'s Perseverance Iron Works *v.* Ollier, 711
Robinson (executors') case (6 De G. Mc. & G.), 367, 377, 385, 386
ex parte (3 D. & C. and 1 M. & A.), 667, 668, 673*
(4 D. & C.), 737
v. Alexander, 259, 508, 509, 591
v. Anderson, 49, 84, 349, 350*, 380, 478
v. Ashton, 329
v. Davison, 419
v. Field, 508
v. Hadley, 549
v. Hofman, 137
v. Kitchin, 97
v. MacDonnell, 678
v. Marchant, 279
v. Preston, 51
v. Thompson, 314, 512
v. Wilkinson, 178, 245, 253, 281
Robley *v.* Brooke, 323, 350
Robson *v.* Curtis, 567
v. Drummond, 276, 287*
v. M'Creight, 495
Rock *v.* Lazarus, 113
v. Mathews, 552
Rodgers *v.* Maw, 240, 252, 450
Roe *v.* Galliers, 678
Rogers *v.* Harvey, 348
v. Mackenzie, 695
v. Price, 373
Rolfe *v.* Flower, 208, 249, 706
Roope *v.* D'Avigdor, 457, 492
Rooth *v.* Quin, 170, 210, 222, 702
Rose, *ex parte*, 680
v. Hart, 658*
Ross, *ex parte*, 658, 660
v. Parkyns, 10, 13
Rothwell *v.* Humphries, 131
Routh *v.* Peach, 454, 515
v. Webster, 446, 544
Rowe *v.* Wood, 56, 301, 404, 518, 550. 553*
Rowland and Crankshaw, *re*, 690, 700
Rowlands *v.* Evans, 425, 552, 553*, 555, 556, 558*, 578*, 591
Rowlandson, *ex parte* (1 Rose, 89), 28, 30, 640, 642
(1 Rose, 416, and 2 V. & B. 172), 334, 338, 698
(3 P. & W. 405), 743, 744, 746

*Page

Rowley *v.* Adams, 328, 347, 488, 537, 612
v. Horne, 222
Roxburghe *v.* Cox, 297
Royal Bank of Scotland *v.* Commercial Bank of Scotland, 712
Ruffin, *ex parte*, 334, 335, 336*, 352, 587, 697*, 698
Rule *v.* Jewell, 470*, 472, 473, 475
Rumboll, *ex parte*, 649
Ruppell *v.* Roberts, 144, 178
Russell, *ex parte* (19 Ch. D. 588), 654
re (19 Ch. D. 432), 620
v. Austwick, 310*, 311
v. Pellegrini, 453
v. Reece, 177
v. Russell, 426, 453, 487, 575
Russell's Patent, 62
Rutherford, *ex parte*, 695, 720
Ryall *v.* Larkin, 659
v. Rowles, 354, 655, 677, 678, 679, 682, 684
Ryan, *re*, 341
v. Mackmath, 214
Ryhope Coal Co. *v.* Foyer, 5

Sadler, *ex parte*, 731
v. Lee, 77*, 153*, 161, 577, 596
v. Nixon, 566
Saffery, *ex parte*, 629, 630, 632
St. Aubyn *v.* Smart, 151, 152, 159
St. Barbe, *ex parte*, 726, 736
St. James's Club, 50
Sainter *v.* Ferguson, 455
Salomons *v.* Nissen, 141, 267
Salting, *ex parte*, 661, 718*
Saltoun *v.* Houstoun, 451
Sammon, *ex parte*, 715
Sander *v.* Sander, 578
Sanders *v.* King, 507
Sanderson *v.* Brooksbank, 169
Sandford *v.* Ballard, 58, 59
Sandilands *v.* Marsh, 138*
Sangster *v.* Mazarredo, 87, 89, 128
Sargant *v.* Read, 548, 550, 553
Saull *v.* Browne, 507, 508
Saunders *v.* Druce, 611
Saville *v.* Robertson, 204*, 205
Savin, *re*, 720
Sawyer *v.* Goodwin, Add. to p. 163
Sayer *v.* Bennet, 577, 578, 579
Scarf *v.* Jardine, 40, 42, 46*, 47, 197*, 211, 221, 256, 286, 702, 706
Scarth, *ex parte*, 678
Schofield, *ex parte*, 714, 718

*Page

Scholefield *v.* Heafield, 591
Scholey *v.* Central Rail. Co. of Venezuela, 490
Scott *v.* Avery, 452
v. Beale, 209, 230, 231
v. Franklin, 289
v. Godwin, 275
v. Izon, 609, 723
v. McIntosh, 567
v. Miller, 100
v. Milne, 467
v. Rayment, 476
v. Surman, 162
Scudemore *v.* White, 509
Sculthorpe *v.* Tipper, 612
Seddon, *ex parte*, 254, 704
v. Connell, 462, 463, 501
Sedgwick's case (or, *ex parte*), 382, 386
v. Daniell, 566
Sedgworth *v.* Overend, 278, 279
Seeley *v.* Boehm, 494, 502
Seligmann *v.* Le Boutillier, 453
Selkrig *v.* Davies, 719
Selwyn *v.* Harrison, 374
Senhouse *v.* Christian, 468*, 469, 473, 475
Seroka *v.* Kattenburg, 78
Sewell *v.* Bridge, 516
Seymour *v.* Bridge, 371
Shack *v.* Anthony, 255
Shackell *v.* Rosier, 370
Shackle *v.* Baker, 440
Shakeshast and others, *ex parte*, 722*
Shakespear, *re*, 78
Shallcross *v.* Oldham, 309
Shanks *v.* Klein, 341
Sharon Coal Corp. *v.* Fulton Bank, 79
Sharp, *ex parte*, 641, 642
v. Milligan, 139
v. Taylor, 91, 107*, 108
v. Warren, 568
Sharpe *v.* Cummings, 52, 349
v. Gibbs, 255
Sharpley *v.* Louth and East Coast Railway Co., 490
Shaw, *ex parte*, 707
v. Benson, 102, 103
v. Chung, 508
v. Galt, 13, 32*
v. Harvey, 87
v. Picton, 389
Sneeham *v.* Great East. Rail. Co., 62
Sheen, *ex parte*, 690, 742
Sheffield Gas, &c. Co. *v.* Harrison, 476
Sheil, *ex parte*, 37

*Page

Shelley, *re*, 680
Sheldon *v.* Rothschild, 657
Shepherd, *ex parte*, 716
v. Allen, 579
Sheppard, *ex parte* (19 Q. B. D.), 200, 745, 749
(Mon. & Bl.), 695
v. Baillie, 280
v. Oxenford, 107*, 463, 499*, 500, 546*, 521, 552
Sheriff of Middlesex, *ex parte*, 649
Sherman *v.* Sherman, 467*
Sherry, *re*, 227, 230
Shipton *v.* Thornton, 187*
Shirreff *v.* Wilks, 173*, 209
Showler *v.* Stoakes, 135, 272
Shrubsole *v.* Sussams, 629, 679
Sibley *v.* Minton, 463
Sibson *v.* Edgeworth, 463
Sichel *v.* Mosenthal, 476
Siddall, *re*, 50
Siebert *v.* Spooner, 627
Siffkin *v.* Walker, 187
Sillitoe, *ex parte*, 721*, 725, 726, 727, 734, 736
Silver *v.* Barnes, 50
Sim *v.* Sim, 512
Simmons, *re*, 644
v. Leonard, 409, 429, 431*, 573
v. Swaine, 454
Simms *v.* Barry, 195
Simons *v.* Johnson, 238
Simpson, *re* (9 Ch.), 337, 698, 699
ex parte (De Gex), 631
claim (36 Ch. D.), Add. to pp. 126, 138
v. Chapman, 461, 524, 532*, 617, 619*
v. Henning, 238, 251, 748
v. Vaughan, 194, 596
v. Westminster Palace Hotel Co., 314
Sims *v.* Bond, 275
v. Britain, 275
v. Brutton, 151, 156*, 157, 159, 165
Simson *v.* Cooke, 118
v. Ingham, 227, 232*
Sinclair, *re*, 665
v. Wilson, 630, 681
Singer's Man. Co. *v.* Wilson, 114
v. Loog, 114
Skaife *v.* Jackson, 270
Skeet *v.* Lindsay, 511
Skinner *v.* Stocks, 276, 277

*Page

Skipp *v.* Harwood, 340, 352, 359
Skirving *v.* Williams, 615
Slater, *ex parte*, 224, 703
v. Lawson, 262
v. Willis, 324
Sleech's case, 161, 194, 200, 250, 253, 596, 597, 602, 752
Slee, *re*, 682
Slim *v.* Croucher, 481
Slipper *v.* Stidstone, 291, 341
Small *v.* Attwood. 162, 464, 480
Smallcombe *v.* Olivier, 643
Smart, *ex parte*, 713
Smith's case (4 Ch.), 98
Smith, *ex parte* (Buck), 681, 741
(4 Deac. & Ch.), 683
(1 Gl. & J. 74, and 6 Madd. 2), 734, 738
(1 Gl. & J. 256), 640, 747*
(3 Madd.), 328, 681
(2 Mon. & A.), 695
(1 M. D. & D.), 706
(2 Rose), 733
(14 Q. B. D.), 725
(5 Ves.), 583, 637, 648
v. Anderson, 5, 101, 102
v. Ayres, 607
v. Baily, 129, 188
v. Ball, 112
v. Barrow, 564, 567
v. Braine, 169
v. Cannan, 628
v. Chadwick, 480, 481, 482
v. Craven, 190, 203
v. De Silva, 352, 354, 648
v. Duke of Chandos, 408, 536
v. Everett, 440, 443, 444, 488, 527, 614, 616
v. Fromont, 544
v. Goddart, 672
v. Harrison, 360
v. Howth, 562
v. Jameson, 161, 240
v. Jarves, 188
v. Jeyes, 406*, 466, 542, 543, 546, 551, 580
v. Johnson, 131
v. Leveaux, 458
v. Lindo, 97
v. Mawhood, 95
v. Mules. 331, 415, 428*, 558
v. Oriell, 218, 569, 671, 672
v. Parkes, 292*, 364
v. Plummer, 355
v. Smith (3 Giff.), 194, 620*

*Page

Smith (5 Ves.), 323, 325, 329
v. Snow, 460
v. Stokes, 218, 340, 569, 671, 672
v. Timms, 627
v. Topping, 681, 682
v. Watson, 15, 28, 36, 49, 135, 328
v. Wigley, 229
v. Winter, 215*, 219, 220
Smout *v.* Ilbury, 211
Smyth, *ex parte*, 716, 750
Snaith *v.* Burridge, 172
Snape, *ex parte*, 739
Sneyds, *ex parte*, 633
Snook *v.* Watts, 76
Snowball, *ex parte*, 632, 664, 665
Snowdon, *ex parte*, 375
Soames, *ex parte*, 660
Société Générale de Paris *v.* Green, 714
v. Tramways Union Co., 680
Society of Practical Knowledge *v.* Abbott, 496
Solly *v.* Forbes, 237*
Solomon, *ex parte*, 714, 746
v. Medex, 279
Solvency Mutual Guarantee Co. *v.* Freeman, 118
Somerville *v.* Mackay, 311, 508
Somes *v.* Currie, 409
South Carolina Bank *v.* Case, 182
South Sea Co. *v.* Wymondsell, 260
South Wales Atlantic Steamship Co., 103
Southwell *v.* Bowditch, 180
Spackman *v.* Miller, 682
Spark *v.* Heslop, 374
Sparrow, *ex parte*, 629, 631
Spears *v.* The Lord Advocate, 340
Spenceley *v.* Greenwood, 215, 244
Spencer *v.* Billing, 89
v. Harrison, 348
v. Spencer, 515*
Spittal *v.* Smith, 486*
Spottiswoode's and Amsink's case, 367, 369
Sprague, *ex parte*, 336, 337, 680, 686*, 700
Spurr *v.* Cass, 276
Stables *v.* Eley, 47*, 89, 149, 214
Stackwood *v.* Dunn, 296
Staddon, *ex parte*, 657, 662*
Stahlschmidt *v.* Lett, 387
Stainbank *v.* Fernley, 482
Stainton *v.* Carron Co., 384, 488, 511*, 513, 537, 611*, 613

*Page

Stanborough, *ex parte*, 704
Stanger *v.* Wilkins, 627, 628
Staniforth *v.* Fellowes, 659
Stansfield *v.* Cubitt, 679, 681
v. Levy, 281
Stanton, *ex parte*, 718
Iron Co., *re*, 30
Staples, *re*, 208
Stavers *v.* Curling, 19, 416, 563
Stead *v.* Salt, 129
Stedman *v.* Smith, 562
Steel *v.* Lester, 14, 34, 149
Steele *v.* Stuart, 141
Steer *v.* Crowley, 450
Steiglitz *v.* Eggington, 137
Stephens, *ex parte*, 654, 661*, 662
v. Brown, 729
v. Reynolds, 129, 181*
Stephenson *v.* Chiswell, 597
Sterndale *v.* Hankinson, 228, 229
Sterry *v.* Clifton, 92, 100
Steuart *v.* Gladstone, 402, 421, 426, 428, 430, 444, 448, 575
Stevens *v.* Benning, 114, 288*
v. Cook, 390, 391
v. South Devon Railway Co., 314, 352, 393
Steward *v.* Blakeway, 55, 56, 331, 334, 343, 346*, 347
v. Harkness, 482
Stewart *v.* Forbes, 349, 350
v. Gibson, 93, 106
Stewart's case 536
Stockten *v.* Dawson, 352, 353, 381, 384, 489*, 528, 617, 688
Stocker *v.* Brocklebank, 13, 14, 563
v. Wedderburn, 476
Stokes *v.* Lewis, 370, 373
Stone, *ex parte* (8 Ch.), 748
re (33 Ch. D.), 36, 37
v. Marsh, 155*, 157
Stonehouse *v.* De Silva, 289, 638
Stoveld, *ex parte*, 670
v. Eade, 234
Stracey *v.* Deey, 295*
Strachan *v.* Barton, 630
Strang, *ex parte*, 657
Strange *v.* Lee, 118
Strangford *v.* Green, 129
Streatfield, Lawrence & Co., *re*, 330*
Street *v.* Rigby, 451
Strelley *v.* Winson, 60, 62
Strickland *v.* Symons, 606, 607*, 609, 610
Strong *v.* Harvey, 51

*Page

Strother *v.* Willan, 85
Stroud *v.* Gwyer, 162, 521, 524, 531, 618
Strutt, *ex parte*. 695
Stuart *v.* Lord Bute, 404, 503, 504
v. Ferguson, 698
Stubbs *v.* Sargon, 112, 113
Studdy *v.* Saunders, 87, 89
Stupart *v.* Arrowsmith, 467, 512
Sturgis *v.* Darell, 259
Sturt *v.* Mellish, 467
Sturton *v.* Richardson, 560
Styan, *ex parte*, 681
Sully, *ex parte*, 680
v. A. G., 394
Sumner *v.* Powell, 196*, 595
Sutton *v.* Clarke, 283
v. Gregory, 129, 169
v. Tatham, 371, 372
Swan *v.* Bank of Scotland, 95
v. Steele, 169, 181*
Swift *v.* Jewsbury, 138, 165, 179
v. Winterbotham, 139, 165, 179
Swindell *v.* Bulkeley, 259
Swire *v.* Francis, 163
v. Redman, 244, 251, 252
Syers *v.* Syers, 14, 22, 38, 555, 556*, 557, 572
Sykes *v.* Beadon, 102, 104, 105*, 106, 107, 108
Symes *v.* Hughes, 107

Taitt, *ex parte*, 692, 729, 730, 733
Tallis *v.* Tallis, 438*
Tamplin *v.* Diggins, 663
Tanner's case, 24
Tanner *v.* Smart, 260
Tasker *v.* Shepherd, 113*, 114
Tatam *v.* Williams, 363, 509*
Tate, *ex parte*, 694
Tatlock *v.* Harris, 239
Tattersall *v.* Groote, 66, 454
Taunton *v.* Royal Insurance Co., 128
Taylor, *ex parte* (5 De G. M. & G.), 631
(12 Ch. D.), 37
(18 Q. B. D.), 629, 630
(8 De G. M. & G.), 74, 75
(Mon.), 679, 687, 688, 689*
(2 M. D. & D.), 685, 706, 707, 732
(2 Rose), 737
v. Best, 72
v. Bowers, 106, 107

*Page

Taylor *v.* Crowland Gas and Coke Co., 95
v. Davis, 404, 420, 542
v. Dean, 495
v. Fields, 340, 359, 647
v. Hare, 65
v. Haylin, 514
v. Kymer, 234
v. Lendey, 106
v. Midland Railway Co., 267, 270
v. Plumer, 162
v. Rundell (11 Sim. & Cr. & Ph.), 503
(1 Y. & C. C. C. & 1 Ph.), 404, 503
v. Salmon, 464
v. Shaw, 512
(L. J. James, 7th March, 1873), 342
Teague *v.* Hubbard, 567, 569
Teasdale *v.* Sanderson, 59, 60
Teed *v.* Elworthy, 295
Telegraph Despatch Co. *v.* McLean, 436
Telford *v.* Ruskin, 502, 503
Tempest, *ex parte*, 629, 630
Tenant *v.* Elliott, 107*, 108
Tench *v.* Roberts, 100
Tennant, *ex parte*, 13, 34, 38
Terrell, *ex parte*, 647, 728, 742
Terry *v.* Terry, 619
Tew *v.* Earl of Winterton, 389
Thacker *v.* Shepherd, 277
Thicknesse *v.* Bromilow, 130, 169
Thomas, *ex parte*, 631
v. Atherton, 129, 367, 378, 379, 387
v. Clarke, 147
v. Da Costa, 656
v. Edwards, 51
v. Frazer, 194, 596
v. Shillibeer, 242
v. Thomas, 59, 567
Thomason *v.* Frere, 289, 659, 667*, 668
Thompson, *ex parte* (1 Rose), 642
(3 Deac. & Ch.), 726
(2 M. D. & D.), 723
v. Andrews, 609
v. Brown, 225, 228, 234, 236
v. Charnock, 514
v. Cohen, 752
v. Davenport, 177
v. Dunn, 508
v. Hudson, 228
v. Lack, 237
v. Nat. Bank of Toledo, 43

*Page

Thompson *v.* Percival, 242*, 243, 247*, 253
v. Ryan, 325
v. Speirs, 680
v. Waithman, 263, 597
v. Williamson, 349, 380
Thomson *v.* Anderson, 548
v. Thomson, 104, 109
Thornbury *v.* Bevill, 93
Thorne *v.* Smith, 224
Thornton, *ex parte*, 716, 749
v. Dixon, 343*, 346, 347
v. Howe, 92
v. McKewan, 228
v. Procter, 383*, 467
Thorp *v.* Holdsworth, 491
Thorpe, *ex parte*, 171, 703
v. Jackson, 596, 597
Thwaites *v.* Richardson, 128
Tibaldi *v.* Ellerman, 565, 567
Till *v.* Wilson, 639
Tinkler *v.* Walpole, 85
Titner, *ex parte*, 698
Tittenson *v.* Peat, 515
Tobin, *ex parte*, 642
Todd, *ex parte* (De Gex), 738
(19 Q. B. D.), 654
v. Emly, 50
v. Studholme, 151
Tollemache, *re*, 703
Tomkins *v.* Saffery, 629
Tomlins *v.* Lawrence, 136
Toovey *v.* Milne, 653
Tophan., *ex parte* (1 Madd.), 715
(8 Ch.), 629, 630
Topping, *ex parte*, 599
Torkington, *ex parte*, 633
Tosh *v.* North British Build. Soc., 12
Toulmin, *ex parte*, 405
v. Copeland, 230, 404, 405, 417*, 506, 518, 528, 537
Townend *v.* Townend, 528*, 615, 616, 617
Towns *v.* Mead, 258
Townsend *v.* Ash, 492
v. Crowdy, 566, 567
v. Neale, 276
Townshend *v.* Devaynes, 344*
Travis *v.* Milne, 488, 494, 517, 522, 531, 610, 613, 618
Tredwen *v.* Bourne, 87, 90, 133
Troughton *v.* Hunter, 215, 426, 446, 544, 588
Troup's case, 390
Trueman, *ex parte*, 588, 670

	*Page
Trueman *v.* Loder,	275
Tunley *v.* Evans,	128
Tupper *v.* Foulkes,	137
v. Haythorne,	140, 673
Turner, *ex parte*,	734, 738
v. Borlase,	475
v. Burkinshaw,	391
v. Corney,	537
v. Dodwell,	261
v. Hardcastle,	627
v. Major,	443, 448*, 478, 479, 527, 541, 550
v. Morgan,	59
v. Reynall,	98
Turney, *ex parte*,	717*
v. Bayley,	404, 493, 504
Turquand, *ex parte* (2 M. D. & D.),	21, 65, 727*, 738
(14 Q. B. D.),	677
v. Vanderplank,	631, 665
v. Wilson,	501
Twiss *v.* Massey,	692
Twogood, *ex parte*,	660
v. Swanston,	513
Twort *v.* Twort,	59
Twycross *v.* Grant,	595
Twyford *v.* Trail,	161
Tyrrell *v.* Hope,	574
Underwood *v.* Nicholls,	136
Union Bank of Manchester, *ex parte*,	678
Unity Banking Association, *ex parte*,	75, 702
University of Cambridge *v.* Baldwin,	118
Upfill, *ex parte*,	636
Upton, *ex parte*,	729
v. Brown,	621
Urquhart *v.* Macpherson,	260, 490
Usborne, *ex parte*,	680, 685
Usher *v.* Dauncey,	187, 211*
Valpy *v.* Oakeley,	652
Van Sandau *v.* Moore,	462, 463, 571
Vardon, *ex parte*,	687
Varley *v.* Coppard,	336
Varney *v.* Hickman,	106
Vaughan, *ex parte*,	745
v. Halliday,	712
v. Vanderstegen,	120, 439
Vaux, *ex parte*,	677
Venables *v.* Wood,	14, 179
Venning *v.* Leckie,	562
Vere *v.* Ashby,	89, 208, 285, 413
Vernon *v.* Hallam,	440
v. Hankey,	663, 668
v. Jeffreys,	273
v. Vawdry,	513
Vice *v.* Anson,	42, 87*, 348
v. Fleming,	170, 171, 174, 210
Vickers *v.* Vickers,	432, 433
Villars, *ex parte*,	358
Viney *v.* Chaplin,	151
Vining, *ex parte*,	695
Vivers *v.* Tuck,	476
Vognel, *ex parte*,	694
Vulliamy *v.* Noble,	47, 152, 199, 211, 292, 294, 461, 590, 596, 605, 606, 661, 662
Vyse *v.* Foster,	162, 200, 461, 504, 521, 523, 524,* 531, 534*, 615, 617, 618
Wade *v.* Jenkins,	402, 421, 444, 448*
Wadeson *v.* Richardson,	376*
Wadmore *v.* Dear,	348
Wagner *v.* Imbrie,	753
Wagstaffe, *ex parte*,	657
Wainwright, *ex parte*,	756
v. Waterman,	433
Wait, *re*,	340, 357, 359, 675, 695
Wakeham, *re*,	737*
Walburn *v.* Ingilby,	504
Walker, *ex parte* (3 Deac.),	715
(4 D. G. F. & J.),	336, 338, 698
v. Broadhurst,	418
v. Consett,	512
v. Harris,	64, 559
v. Hirsch,	10, 11, 14, 541, 544, 555
v. Jeffreys,	468
v. Mottram,	440, 652
v. Rooke,	267
Wallace *v.* Kelsall,	136, 224, 269, 294
Waller *v.* Barrett,	594
v. Lacy,	227
Wallis, *ex parte*,	740
v. Hirsch,	453
v. Smith,	455
Wallworth *v.* Holt,	462, 463*, 498*, 499, 500
Walmsley *v.* Cooper,	145, 225, 237, 270
v. Walmsley,	405, 538
Walsham *v.* Stainton,	503
Walstab *v.* Spottiswoode,	24
Walter *v.* Lavater,	62
Walton *v.* Butler,	325, 329
Wanklyn *v.* Wilson,	505
Want *v.* Reece,	563

*Page

Ward, *ex parte*, 682
v. Apprice, 404
v. Ward, 612
Warde's case, 152, 199, 596
Warden *v.* Jones, 486
Warder *v.* Stilwell, 424, 466, 539, 543
Waring, *ex parte*, 653, 712*
v. Knight, 676
Warner *v.* Barber, 639
v. Cunningham, 575
v. Smith, 351, 517
Warrant Finance Co's case, 228
Warwick *v.* Slade, 370, 371
Waterer *v.* Waterer, 331, 332, 333*, 346*
Waterfall, *ex parte*, 255, 704*
Waterlow *v.* Sharp, 132
Waters *v.* Paynter, 285
v. Taylor, 357, 452, 466, 544, 546, 558, 577, 580
v. Towers, 267
Watkins, *ex parte* (Mont. & McA.), 734
(2 M. & A.), 680, 683
(4 D. & C.), 683
(8 Ch.), 677
Watney *v.* Wells, 390, 518, 521, 581
Watson, *ex parte* (Buck, and 4 Madd.), 728, 741, 742
(12 Ch. D.), 639
(16 Ves.), 40, 75
(19 Ves.), 31
(2 V. & B.), 161
v. Black, 348
v. Charlemont, 86, 482
v. Eales, 426
v. Mid-Wales Railway Co., 296
v. Spratley, 348
v. Woodman, 263
Watters *v.* Smith, 224, 225
Watts *v.* Brookes, 97, 104, 388
v. Christie, 293, 659, 660*
v. Rees, 290
Waugh *v.* Carver, 25, 27*, 31, 35, 36, 40*, 42, 197
Way *v.* Bassett, 262*, 510
Weaver *v.* Prentice, 85
Webb, *re*, 382, 387
v. Ledsam, 218
Webber *v.* Tivill, 259, 288, 509
Webster, *ex parte*, 703
v. Bray, 84, 349, 350, 380, 391, 477*
v. Webster, 47, 211, 217, 445*, 605

*Page

Wedderburn *v.* Wedderburn, 443, 444, 489*, 512, 516, 517, 519, 533*, 614*, 617
Weikersheim's case, 112, 141
Weir *v.* Bell, 163
Weldon *v.* Dicks, 113
Welford *v.* Liddel, 508
Wellcome's Trade Mark, *re*, 447
Wells *v.* Masterman, 171
v. Wells, 564
v. Williams, 73
Welsh, *ex parte*, 639
Wenlock (Baroness) *v.* River Dee Co. 191, and see Addenda
Werderman *v.* Société Générale d'Electricité, 436
West *v.* Baker, 643
v. Skip, 340, 352, 353, 382, 518, 647, 682, 688
Western Bank of Scotland *v.* Needell, 213
West of England Bank, *re*, 162
West of England, &c., Bank *v.* Murch, 341
West Riding Union Banking Co., *ex parte*, 715, 717
Westcott, *ex parte*, 724, 738
Weston *v.* Barton, 118
Weymouth *v.* Boyer, 460
Wharton *v.* May, 513
Whately *v.* Menheim, 90
Wheatley, *ex parte*, 190, 703
v. Westminster, &c., Coal Co., 453
Wheeler, *ex parte*, 334, 337*, 699*
v. Horne, 59, 61
v. Van Wart, 122*, 460, 461, 571
Whetham *v.* Davey, 364, 461, 493, 517
Whincup *v.* Hughes, 65, 66, 67
Whinney *v.* Colonial Bank, 678
Whitcomb *v.* Whiting, 260, 261
White, *ex parte*, 160, 702
v. Ansdell, 563
v. Barker, 502
v. Barton, 505
v. Williams, 136
Whitehead *v.* Barron, 207
v. Hughes, 271, 289, 670
Whitley *v.* Lowe, 508, 511, 554
Whitmore, *ex parte*, 208*, 249, 254, 704*
v. Empson, 678
v. Gilmour, 652
v. Mason, 433, 648*
Whittaker *v.* Howe, 439, 478, 479, 543

*Page

Whittingstall *v.* Grover, 599
Whittle *v.* McFarlane, 380
Whitwell *v.* Arthur, 578
v. Perrin, 178, 254, 257
Whitworth, *ex parte*, 230
v. Davis, 493
Whyte *v.* Ahrens, 508, 514
Wickham *v.* Wickham, 128, 146, 227, 235*
Wieland, *ex parte*, 634
Wier *v.* Tucker, 508
Wightman *v.* Townroe, 28, 593, 604
Wilbeam, or Wilbran, *ex parte*, 636
Wild *v.* Milne, 55, 555, 556, 557, 558
Wilde *v.* Keep, 185
Wiles *v.* Woodward, 563
Wilkinson, *ex parte* (13 Sim.), 680
(22 Ch. D.), 629
v. Frazier, 19, 29*
v. Haygarth, 59, 60
v. Henderson, 460, 494, 596, 597
v. Page, 454
v. Torkington, 476
Wilks *v.* Back, 177
Willesford *v.* Watson, 453
Willett *v.* Chambers, 151*, 156
v. Blandford, 521, 525, 617
Williams, *re* (36 Ch. D.), 709
ex parte (Buck), 208, 705
(3 M. D. & D.), 721, 727*, 736
(11 Ves.), 217, 334, 337*, 352, 583, 587, 588, 687, 698, 700
v. Barton, 61, 562, 568
v. Beaumont, 278
v. Bingley, 542
v. Griffiths, 227, 509
v. Jones, 81, 100, 102*, 202, 412
v. Keats, 89, 214, 216*, 217
v. Mudie, 85
v. Page, 467
v. Powell, 531, 615
v. Prince of Wales's Life Co., 504
v. Rawlinson, 227 230
v. Rowlands, 425, 552, 553*, 555, 557, 558, 578*
v. Salmond, 463
v. Thomas, 186
v. Williams (2 Swanst.), 437*
(1 Wils. Ch.), 478
(2 Ch.), 81, 85, 331
Williamson *v.* Barbour, 142, 143, 267, 513
v. Johnson, 185*
Willis *v.* Bank of England, 141

*Page

Willis *v.* De Castro, 237
v. Dyson 170, 175, 210
v. Jernegan, 512
Willison *v.* Patterson, 72, 73
Willmott *v.* London Celluloid Co., 628
Willock, *ex parte*, 733
Wilmer *v.* Currey, 197*, 595
Wilsford *v.* Wood, 88, 285
Wilson, *ex parte* (7 Ch.), 719, 748
(2 Deac. and 3 M. & A.), 670
(4 Deac. & Ch.), 678
(2 Jur.), 716
(1 M. D. & D.), 645
(3 *ib.*), 192, 702
v. Bailey, 173
v. Barthrop, 181
v. Church, 576
v. Cutting, 566
v. Greenwood, 218, 429, 433, 493, 517, 551, 553, 554, 555*, 556, 557, 559, 587, 647
v. Hurst, 234
v. Johnstone, 66, 68*, 69
v. Lewis, 22, 173
v. Lloyd, 239, 248, 251, 254, 597
v. Moore, 162, 200, 617
v. Northampton, &c., Railway Co., 503
v. Stanhope, 463, 499
v. Tumman, 148, 206
v. Whitehead, 14, 144, 179, 203*, 328
Winch *v.* Keeley, 289, 652
Windham *v.* Paterson, 635
Wingfield, *ex parte*, 677, 683
Winter *v.* Innes, 250, 253, 262*, 510, 596, 597
Winterbottom, *ex parte*, 626
Wintle *v.* Crowther, 169, 181
Wish *v.* Small, 29
Withington *v.* Herring, 13, 28
Wolfe *v.* Horncastle, 372
Wood, *re* (7 Ch.), 627, 628
, *ex parte* (De Gex), 691*
(1 M. D. & D.), 637
(2 *ib.*), 730
(4 De G. M. & G.), 677
(10 Ch. D.), 337, 629, 699
v. Argyll, 24, 44*, 89, 90
v. Braddick, 128, 240
v. Dodgson, 741, 752*
v. Finch, 50
v. Scoles, 402, 403, 421
v. Wilson, 454
v. Woad, 408, 426, 487, 575

	*Page
Woodbridge *v.* Swann,	672, 674
Woodford, *ex parte*,	720
Woodgate, *ex parte*,	680, 686
Woodhouse *v.* Murray,	628, 629
Woodin, *ex parte*,	161
Woodroffe, *ex parte*,	740
Woodward *v.* Gyles,	455
Wooldridge *v.* Norris,	375
Wooley *v.* Batte,	378, 566
v. Gordon,	601, 612
v. Kelly,	200
Woolf *v.* City Steam Boat Co.,	265
Worcester Corn Exchange Co., *re*,	132, 141, 190, 369, 385
Worrall *v.* Grayson,	567
Worthington, *ex parte*,	638
Worts *v.* Pern,	85, 89
Wragge's case,	680
Wray *v.* Hutchinson,	580
v. Milestone,	564
Wrexham *v.* Hudleston,	577
Wright, *ex parte*,	645
v. Court,	128
v. Hunter, 385, 493, 495, 566,	752
v. Laing,	227
v. Pulham,	215
v. Russell,	118
v. Snowe,	75
v. Tuckett,	621
v. Warren,	620
Wrightson *v.* Pullan,	215, 222
Wych *v.* East India Co.,	259
Wyld *v.* Hopkins,	24, 44
Wylie, *ex parte*,	732
Wynget *v.* Heathcote,	55, 56
Yallop, *ex parte*,	324
Yates *v.* Finn,	411, 522, 527*, 528, 616
Yeatman *v.* Yeatman,	613
Yonge, *ex parte*,	734
Yonge Klassina, the,	73
York and North Midland Railway Co. *v.* Hudson,	384
Yorkshire Banking Co. *v.* Beatson,	182*
Young, *ex parte* (2 V. & B.),	54, 61
(19 Ch. D.),	300, 624
(2 Rose),	741
v. Axtell,	89
v. Bank of Bengal,	656*, 661
v. English,	227, 228
v. Goodson,	272
v. Hunter,	205, 206*, 285
v. Keighley,	359
v. Waud,	627, 630
v. White,	136
Zwilchenbart, *ex parte*,	631
v. Harrison (4 Madd.),	508

STATUTES REFERRED TO.

[Reference is to Star (*) paging.]

	*Page
13 Eliz. c. 5,	631
21 Jac. 1, c. 16	
(Stat. Lim.),	258
§ 3,	258, 259, 262, 508
7,	258
29 Car. 2, c. 3	
(Stat. of Frauds)	
§ 4,	80, 81, 348
17,	348
4 & 5 Ann. c. 16	
(Stat. Lim.),	258
§ 17,	258
19,	258
27,	58, 59
6 Geo. 1, c. 18,	97
§ 18,	101
2 Geo. 2, c. 22,	290
8 Geo. 2, c. 13,	
§ 1,	113
8 Geo. 2, c. 24,	290
9 Geo. 2, c. 36,	348
10 Geo. 2, c. 28,	101
25 Geo. 2, c. 36,	101
28 Geo. 2, c. 19,	101
29 Geo. 2, c. 16 (Irish),	108
28 Geo. 3, c. 30,	101
39 & 40 Geo. 3, c. 28	
§ 15,	96
39 & 40 Geo. 3 c. 98,	99
55 Geo. 3, c. 194	
(Medical act)	
§ 14,	98, 99
4 Geo. 4, c. 94	
§§ 132, 133,	95
5 Geo. 4, c. 114	
§ 1,	97
6 Geo. 4, c. 16	
§ 62,	731
6 Geo. 4, c. 42,	
§ 10,	96
6 Geo. 4, c. 81	
§ 7,	95
6 Geo. 4, c. 94,	140
6 Geo. 4, c. 133,	99
7 Geo. 4, c. 46,	70, 96, 457, 586, 739
9 Geo. 4, c. 14	
(Ld. Tenterden's act),	509
§ 1,	261, 262
6,	138, 165
8,	262
9 Geo. 4, c. 23,	96
9 Geo. 4, c. 83,	140
11 Geo. 4 & 1 Wm. 4, c. 68	
§§ 5, 6,	282
3 & 4 Wm. 4, c. 27	
(Stat. Lim.),	258
§ 16,	258
28,	258
40,	258
41,	258
42,	258
3 & 4 Wm. 4, c. 42	
(Stat. Lim.),	258, 719
§ 2,	595
3,	258, 262
4,	258
8,	280
3 & 4 Wm. 4, c. 83,	96
3 & 4 Wm. 4, c. 98,	96
5 & 6 Wm. 4, c. 76	
§ 102,	100
1 & 2 Vict. c. 106	
§§ 29, 31,	71, 74
4 Vict. c. 14,	71
5 & 6 Vict. c. 39,	140
5 & 6 Vict. c. 45,	112
6 & 7 Vict. c. 46,	101
6 & 7 Vict. c. 68,	101
6 & 7 Vict. c. 73	
§ 2,	100

	*Page
6 & 7 Vict. c. 73,	
§ 26,	100
32,	100
7 & 8 Vict. c. 32,	96
§ 8,	95
9,	95
21,	95
23,	95
29,	95
7 & 8 Vict. c. 110,	50, 93
7 & 8 Vict. c. 111,	665
15 & 16 Vict. c. 86,	
§ 54,	537
16 & 17 Vict. c. 70,	
§ 123,	579, 580
16 & 17 Vict. c. 113,	
§ 20,	262
24,	262
27,	262
17 & 18 Vict. c. 104,	
§ 18,	325
37,	324
43,	324
17 & 18 Vict. c. 125,	
§ 11,	452, 515
61,	299
19 & 20 Vict. c. 47	
§ 90,	740
19 & 20 Vict. c. 97	
(Mercantile Law Amend. act,)	258
§ 4,	117, 118, 119
9,	258, 259, 509, 510
10,	255
11,	255
12,	255
13,	262
14,	262, 263, 597
20 & 21 Vict. c. 85,	
§§ 9, 21, 25, 26,	77
21 & 22 Vict. c. 90	
§§ 32 & 40,	98
21 & 22 Vict. c. 108	
§ 6 & 10,	77
23 & 24 Vict. c. 127	
§ 26,	100
25 & 26 Vict. c. 63	
§ 3,	324
25 & 26 Vict. c. 89	
(The Companies act, 1862),	50
§ 2,	70
4,	2, 70, 101
48,	282
28 & 29 Vict. c. 86	
(Bovill's act)	13, 19, 33, 34, 35, *et seq.*, 84, 100, 201

	*Page
30 Vict. c. 23	
§ 7,	80, 97
31 & 32 Vict. c. 40,	55, 56, 59
31 & 32 Vict. c. 116,	456
31 & 32 Vict. c. 121,	98
32 & 33 Vict. c. 71,	
§ 39,	657
§ 81,	657
33 Vict. c. 14,	72
33 & 34 Vict. c. 23,	71, 340
33 & 34 Vict. c. 35,	621
35 & 36 Vict. c. 93	
(Jud. act, 1873)	
§ 24,	259, 293, 375, 376
§ 25,	375, 376
cl. 6,	285, 293, 653
cl. 8,	59, 62, 539, 546
cl. 11,	293
§ 34,	491
§§ 56, 57,	538
37 & 38 Vict. c. 57,	258
§ 3,	258
37 & 38 Vict. c. 68,	
§ 2,	258
37 & 38 Vict. c. 68,	
§ 12	100
37 & 38 Vict. c. 96,	95
38 & 39 Vict. c. 77	
(Jud. act, 1875),	
§ 10,	599, 602, 603, and Add. to p. 628
cl. 2,	260
cl. 11,	259
Rules of the Supreme Court, 1883,	
Order VII.	
r. 3,	265
Order IX.	
r. 6,	266
Order XII.	
r. 15,	266, 299
Order XVI.,	264, 274
r. 1,	265, 274, 280, 282, 288, 293, 647
r. 4,	265, 280, 282, 288, 293, 503, 604, 647
r. 6,	265, 280, 282, 288, 293, 647
r. 7,	501, 592
r. 8,	288
r. 9,	462
r. 11,	265, 273, 274, 275, 278, 296
r. 14,	265, 266
r. 15,	265

*Page

Rules of the Supreme Court, 1883,
Order XVI.
r. 16, 604
rr. 48, *et seq.*, 265, 285, 612
Order XVIII., 612
r. 1, 501, 604, 647
r. 3, 647
r. 6, 265, 278, 604, 647
r. 7, 265
Order XIX.
r. 3, 290, 550
r. 27, 501
Order XXI.
r. 20, 264
Order XXXI.
r. 6, 507
r. 7, 613
Order XXXIII.
r. 2, 538
r. 3, 537
r. 8, 519
Order XXXVI.
r. 8, 508
Order XL.
r. 10, 538
Order XLII.
r. 10, 266, 299, 300, 626
Order L.
r. 6, 550
Order LV.
rr. 3–9, 462
r. 19, 538
Supreme Court Funds Rules, 1886,
r. 63, 135, 272
39 Vict. c. 6,
§ 2, 98
39 & 40 Vict. c. 45, 51
40 & 41 Vict. c. 39, 140
42 & 43 Vict. c. 11,
(Bankers' Books Evidence act), 537
44 & 45 Vict. c. 41,
(Convey. act, 1881)
§ 37, 614, 618
44 & 45 Vict. c. 60,
§ 8, 99
45 & 46 Vict. c. 61
(Bills of Exchange act, 1882),
§ 7, cl. 2, 180
23, 131
cl. 2, 129, 180, 181

*Page

45 & 46 Vict. c. 75
(Married Women's Prop. act, 1882),
§§ 1, 3, 12, 19, 78, 624
§ 3, 730
46 & 47 Vict. c. 49,
§ 3, 537
46 & 47 Vict. c. 52,
(Bank. act, 1883), 622, *et seq.*
§ 2, 622
4, 624, 625
cl. 1 (*a*), 630, 632
(*b*), 627
(*c*), 628
(*e*), 665
5, 625
6,
cl. 1 (*a*), 634
(*c*), 631
(*d*), 624
cl. 2, 634
9, 650, 718,
10,
cl. 2, 290, 709, 718, 754
18, 754
cl. 8, 756
cl. 11, 755
cl. 12, 755
cl. 13, 755
cl. 15, 756
20,
cl. 1, 646, 650
23, 754, 755, 756
cl. 3, 755
27, 670
28, 751
cl. 2, 751
cl. 5, 752
29, 654
30, 752
cl. 1, 751
cl. 4, 224, 752
31, 751
32, 624
35, 643
cl. 2, 643
37, 707
38, 654, 655
39, 714
40, 709
cl. 3, 693, 729, 730, 731
cl. 5, 720, 730
41, 709
42, 709

*Page

46 & 47 Vict. c. 52,
43, 631, 650, 664, 681
44, 646, 650, 651, 652
cl. 1, 683
§ 44,
cl. 3, 625, 677, 678, 681
45, 654, 664, 674
46, 654, 675
cl. 3, 626, 665
47, 654, 664
cl. 1, 654
cl. 2, 654
cl. 3, 654
48, 628, 653, 654, 664,
49, 630, 631, 654, 664, 668
50,
cl. 3, 652
cl. 4, 651
54, 646, 650, 651, 652, 677
55, 651, 652
56,
cl. 1, 652
cl. 5, 651
59, 693, 729, 730
cl. 1, 731
64, 753
88, 117, 624
93, 649, 669
102, 649, 669
cl. 2, 754
cl. 4, 754
106, 643
108, 638
109, 643
110, 637
112, 644
113, 289, 647, 670
114, 289, 290, 670, 718
115, 623, 634
116,
cl. 2, 117, 624
123, 623
148, 624, 645, 707
152, 624
168, 633, 650, 661, 652, 678
169, 622
Schedule I.
r. 13, 645
r. 26, 117, 624
Schedule II.
rr. 9–17, 714
rr. 13, 14, 714

*Page

46 & 47 Vict. c. 52,
Schedule II.
r. 15, 714
r. 18, 748
r. 20, 719, 730
r. 21, 708
Bankruptcy Rules, 1886,
r. 56, 117, 624
r. 69, 670
r. 70, 670
r. 113, 117
r. 114, 117
r. 127, 694
r. 128, 694
rr. 149–151, 634
rr. 195–216, 754
r. 208, 755
r. 211, 755
rr. 21–1213, 755
r. 215, 756
r. 216, 755
rr. 235–238, 751
r. 235, 752
r. 245, 625
r. 258, 623, 633, 645
r. 259, 623, 624
r. 260, 623
r. 261, 623
r. 262, 623
r. 263, 623
r. 264, 623
r. 265, 637
r. 266, 754, 755
r. 267, 754, 755
r. 268, 637, 645, 646
r. 269, 637, 638, 693, 701, 729, 730
r. 270, 694
r. 271, 624
r. 293, 692, 693
r. 349, 652
r. 353, 622, 643
Appendix, Forms 6, 626
46 & 47 Vict. c. 57,
(Trade Marks act, 1883), 114
§ 64, 114, 447
65, 114
70, 114, 447
72, 115
75, 114
47 Vict. c. 3, 97
50 & 51 Vict. c. 57, 756
§ 5, 756
50 & 51 Vict. c. 58,
§ 40, 117
50 & 51 Vict. c. 66, 754

AMERICAN AUTHORITIES CITED.

[Reference is to bottom paging.]

	Page
Abat *v.* Penny,	482
Abbe, *ex parte*,	1199
Abbot *v.* Johnson,	697
Abbott's appeal,	563, 565
Abbott *v.* Pearson,	58, 112
Abernathy *v.* Latimore,	150, 433
Abrahams *v.* Hunt,	827
Ackles *v.* Stockle,	272
Ackroyd's appeal,	62
Adams *v.* Carter,	41
v. Eatherly Hardware Co.,	463
v. Fulton,	23, 917, 930
v. Kable,	826
v. Lairdel,	965
v. Paige,	1015, 1024
v. Ruggles,	179
v. Terrell,	1072
v. Thornton,	177
v. Ward,	586
Addison *v.* Burckmeyer,	602
Adee *v.* Cornell,	105
v. Demorest,	193
Adkins *v.* Arthur,	332
Adler *v.* Foster,	405
Ætna Ins. Co. *v.* Peck,	397, 411
Aiken *v.* Ogilvie,	659
Albright *v.* Voorhies,	626
Alcott *v.* Strong,	114, 172
Alderson *v.* Temple,	441
Alexander *v.* Alexander,	927
v. Barker,	458
v. Coulter,	1001
v. Gorman,	1019
v. Lewis,	705
v. State,	236
Alfele *v.* Wright,	546
Alfred *v.* Thompson,	468
Allan *v.* Centre Valley Co.,	574
Allen *v.* Blanchard,	489, 631
v. Butler,	469
Allen *v.* Cary,	266
v. Farrington,	195
v. Hawley,	814, 861
v. Hill,	999
v. Mason,	577
v. Owens,	114, 172
v. Rostain,	120
v. Wells,	612
v. Withrow,	553
v. Woonsocket Co ,	98
Allison *v.* Davidson,	577, 632, 659
Alsop *v.* Mather,	413, 1012
Alvord *v.* Smith,	627, 628, 721
Ambler *v.* Bradley,	20
v. Whipple,	956, 974
American, &c. Co. *v.* Wortendyke,	362
American Bank *v.* Doolittle,	390
American Bank Note Co. *v* Edson,	515, 523
American Cent. R. R. Co. *v.* Miles,	461
Ames *v.* Downing,	337, 994
Amidown *v.* Oswood,	341
Amstaedt *v.* Blumenfeld,	125
Anderson *v.* Ackerman,	1003
v. Chesney,	610
v. Lemon,	524, 525
v. Levan,	108
v. Norton,	171
v. Powell,	138
v. Robertson,	933
v. Snow,	118
v. Tarpley,	359
v. Taylor,	644
v. Tompkins,	162, 177, 207, 229, 559
v. Wanzer,	171
v. Whitlock,	515, 581
Andrews *v.* Brown,	229, 566, 583, 586, 998
v. Ennis,	150, 432

Page

Andrews *v.* Keith, 506, 609
v. Mann, 604
v. Planters' Bank, 211
Angle *v.* Mississippi, &c. R. R. Co., 222, 994
Anthony *v.* Butler, 202, 206
v. Wheatons, 263, 510
Antrey *v.* Frieze, 69, 114
Appleton *v.* Smith, 42
Arden *v.* Sharpe, 268, 270
Armand *v.* Long, 28
Armstrong *v.* Crocker, 841
v. Fahnestock, 53
v. Robinson, 175, 176
Arnold *v.* Arnold, 776, 936
v. Brown, 227, 339, 618, 966, 976
v. Camp, 300
v. Danziger, 700
v. Hamer, 1015
v. Maynard, 1061
v. Stevenson, 229, 559
v. Wainwright, 566
Arquimbo *v.* Hillier, 63, 83
Artisans' Bank *v.* Treadwell, 472
Ash *v.* Guie, 67, 78
Asker *v.* Odenheimer, 691
Aspinwall *v.* Williams, 33, 301
Astley *v.* Weldon, 762
Athens Bank *v.* Green, 400
Atherton *v.* Tilton, 19
Atkins *v.* Hunt, 327
v. Layton, 614
Atkinson *v.* Rogers, 821
Atlantic State Bank *v.* Savery, 258, 261
Atlas Nat. Bank *v.* Savery, 259
Atwater *v.* Colton, 467
Atwood *v.* Gillett, 968
v. Lockhard, 332, 480
v. Meredith, 610
Auburn, &c. Bank *v.* Fitch, 572
Auld *v.* Butcher, 857
Aultman *v.* Fuller, 14
Aultman *v.* Webber, 218
Austin *v.* Cummings, 760
v. Holland, 366, 367, 369, 391
v. Vandermark, 182
v. Vaughan, 944
v. Walsh, 461, 479
v. Williams, 33
Auten *v.* Ellingerood, 747
Averill *v.* Loucks, 610, 651
v. Lyman, 396
Avery *v.* Lanoe, 32
v. Rowell, 212

Page

Ayrault *v.* Chamberlain, 333
Azel *v.* Betz, 943

Babcock, *ex parte*, 1175
v. Stewart, 332, 736
Bach *v.* State Ins. Co., 358
Backus *v.* Taylor, 369
Bacon *v.* Cannon, 73
v. Hutchings, 348
Badcock *v.* Stone, 265
Bagely *v.* Bellas, 282, 480
Bagley *v.* Smith, 917
Bailey *v.* Clark, 64
Baily *v.* Brownfield, 192, 826
Baird *v.* Baird, 520, 843
v. Cochran, 265
Bake *v.* Smiley, 1012
Baker's Appeal, 625
Baker *v.* Nappier, 224
v. Stackpoole, 380
v. Wimpee, 1019
Baldwin *v.* Richardson, 206
v. Rosseau, 1061
v. Tynes, 177
Baldy *v.* Brackenridge, 2, 476
Ballard, *ex parte*, 1058
Balliett *v.* Fink, 309
Ballin *v.* Ferst, 1073
Balman *v.* Shore, 705
Baltzell *v.* Trump, 713
Banchor *v.* Cilley, 105
Bancker *v.* Harrington, 325
Bank *v.* Carrolton Railroad, 624
v. Donaldson, 881
v. Towle, 625
Bank of Alexadria *v.* Mandeville, 165
Bank of Commerce *v.* Selden, 266
Bank of Commonwealth *v.* Mudgell, 366, 368
Bank of Kentucky *v.* Brooking, 181
v. Herndon, 571, 602
Bank of Louisville *v.* Hall, 610
Bank of Mobile *v.* Anderson, 994
Bank of N. Y. *v.* Vanderhorst, 147
Bank of Port Gibson *v.* Paugh, 355, 999
Bank of Rochester *v.* Monteath, 146, 210, 296
Bank of St. Albans *v.* Gilliland, 182
Bank of S. C. *v.* Humphreys, 255, 356
Bank of Vergennes *v.* Cameron, 62
Bank of Wilmington *v.* Almond, 391
Bankhead *v.* Alloway, 223
Banks *v.* Mitchell, 946

	Page
Barber *v.* Mann,	280
v. Smith,	432
Barclay's Appeal,	1036
Barcroft *v.* Haworth,	120
v. Snodgrass,	222, 1023
Barfield *v.* Longborough,	665
Baring *v.* Crafts,	285
v. Lyman,	171, 564, 932
Barker *v.* Blake,	199
Barlow *v.* Coggan,	1009
v. Reno,	445
v. Wiley,	469
Barnard *v.* Lapeer,	220
Barnes *v.* Elmbinger,	455
Barnet *v.* Watson,	471
Barnett *v.* State,	233
Barney *v.* Currier,	218
Barnstead *v.* Empire Mining Co.,	814
Barrett, *ex parte*,	1081
Barrett, *re*,	209
v. Russell,	280
v. Swann,	179
Barringer *v.* Sneed,	355
Barry *v.* Barry,	171, 881, 941
v. Briggs,	586
v. Foyles,	308
Bart's Appeal,	515
Bartles *v.* His Creditors,	397
Bartlett *v.* Parks,	821
Barton *v.* Williams,	185
Bascom *v.* Young,	179
Bass *v.* Estill,	1015
v. Taylor,	358, 618
Basset *v.* Miller,	586
Bassett *v.* Shepardson,	337
Bataille *v.* Bataille,	927
Bates *v.* Halliday,	200
Battle *v.* Street,	241
Baxter, *re*,	1195
v. Clark,	222, 285
v. Rodman,	20
Bays *v.* Conover,	258
Beacannon *v.* Liebe,	946
Beach *v.* Hayward,	487, 1004
v. Hotchkiss,	918, 929, 942
v. Ollendorf,	209
v. State Bank,	296
v. Vandewater,	109
Beacham *v.* Eckford,	666, 669, 691, 693
Beal *v.* Snedicor,	448
Beali *v.* Poole,	109
Beaman *v.* Whitney,	223
Beau *v.* Gregg,	929
Beardsley, *ex parte*,	1088
Beardsley *v.* Tuttle,	216
Beaston *v.* Harris,	225
Beatty *v.* Ambs,	310
v. Wray,	648
Beauregard *v.* Case,	16, 497
Beaver *v.* Lewis,	646
Beck *v.* Martin,	171
Becker *v.* Boon,	176, 354
Beckham *v.* Peay,	196, 199, 355
Beckley *v.* Munson,	625
Beckwith *v.* Talbot,	14
Bedford *v.* Deakin,	403
Beebe *v.* Rogers,	296
Beecham *v.* Todd,	103
Beecher *v.* Bush,	2, 23
Beeves *v.* Ayers,	574
Belcher *v.* Conner,	81, 138
Bell *v.* Crosby,	453
v. Donohoe,	779
v. Faber,	167
v. Hare,	20
v. Hudson,	785
v. Locke,	746
v. Massey,	318
v. Morrison,	354
v. Newman,	338
Bellis, *ex parte*,	1202
Bellows, *ex parte*,	1200
Belt *v.* Mehen,	850
Belton *v.* Fisher,	490
Bemis *v.* Becker,	226
Benedict *v.* Davis,	55, 56
v. Hettrick,	20
v. Thompson,	188
Benjamin *v.* Covert,	106, 344
Bennet, *ex parte*,	733
Bennett, *re*,	1070
v. Buchan,	360
v. Cadwell,	757
v. Marshall,	358, 445
v. Russell,	644
v. Scott,	461
v. Snyder,	621
v. Stickney,	443, 444
v. Woolfolk,	818
Benniger *v.* Gall,	818
Benninger *v.* Hess,	261
Benson *v.* Ela,	1017
v. Kincaid,	390
v. McBee,	29, 66
Bentley *v.* Harris,	820
v. Smith,	150, 432
Benton *v.* Chamberlain,	342
v. Roberts,	102, 188
Bentrin *v.* Zierlien,	206

Page

Berkshire Woolen Co. *v.* Juillard, 146, 282
Bernard *v.* Parvin, 151, 453
v. Torance, 107, 341, 346, 399, 405
v. Wilcox, 486
Bernie *v.* Vandever, 854
Bernstein *ex parte*, 1200
Berry *v.* Folkes, 229
v. Jones, 648
v. Kelly, 580
v. McLean, 756
v. Powell, 497, 859
Berryhill *v.* McKee, 181, 355
Berthold *v.* Goldsmith, 44
Beste *v.* Creditors, 229
Bethel *v.* Franklin, 924
Bethell *v.* Wilson, 819
Betts *v.* June, 1000
Bevan *v.* Allee, 1015
Bevans *v.* Sullivan, 644, 865
Bewley *v.* Tams, 283
Biddle *v.* Moore, 605
Bieman *v.* Braches, 928
Bigelow, *ex parte*, 1176
v. Elliott, 28, 40
Billings *v.* Meigs, 276
Billingslea *v.* Ware, 850
Billingsley *v.* Dawson, 148
Bininger *v.* Clark, 744, 746, 747
Binney *v.* Legal, 446
v. Young, 319
Birchett *v.* Bolling, 796
Bird *v.* Hamilton, 694
v. Lanius, 276
v Morrison, 561, 563
Birddall *v.* Colie, 902
Birdsall *v.* Bemiss, 237
Birks *v.* French, 227
Bischoffsheim *v.* Baltzer, 998
Bisel *v.* Hobbs, 118, 222, 285
Bishop *v.* Austin 476
v. Breckles, 157, 958, 962
v. Georgeson, 107
v. Hall. 114, 462
Bispham *v.* Patterson, 355
Bissell *v.* Ames, 819
v. Carville. 446
v. Harrington, 102
Bitzer *v.* Shunk, 446
Bjornstad, *re*, 1204
Blachley *v.* Coles, 522
Black's appeal, 562, 1015
Black *v.* Black, 566
v. Bush, 275, 571, 1024

Page

Black *v.* Seipt, 561, 568
v. Struthers, 488
Blackburn *v.* McCallister, 203, 206
Blackwell *v.* Dibrell, 532
v. Rankin, 1017
v. Reid, 432
Blair *v.* Johnston, 189, 661
v. Snover, 461
Blake *v.* Dorgan, 815, 974
v. Sweeting, 336
Blaker *v.* Sands, 228
Blanchard *v.* Coolidge, 19
Blin *v.* Pierce, 459, 473
Blinn *v.* Evans, 191
Bliss *v.* Swartz, 321
Bloch *v.* Price, 365
Blodgett *v.* American Bank, 1040
v. Weed, 179, 261
Blue *v.* Leathers, 29
Blumenthal, *re*, 35
Boardman *v.* Close, 644, 693
v. Gore, 161, 179, 180, 234, 243
Bodenham *v.* Purchas, 382
Bodwell *v.* Eastman, 229
Bogereau *v.* Gueringer, 318, 357
Bohrer *v.* Drake, 14
Boisgerard *v.* Wall, 7, 436, 715
Boling *v.* Anderson, 218
Bolton, *ex parte*, 1157
Bonbonus, *ex parte*, 270
Bond *v.* Aitkin, 205, 206, 207
v. Hays, 937
v. Nave, 117, 171, 1015
v. Pittard, 4
Bonis *v.* Louvnier, 660
Bonnaffee *v.* Fenner, 108
Bonne *v.* Kay, 490
Bonnell *v.* Chamberlain, 113
Bonner *v.* Campbell, 103
Bonney *v.* Stoughton, 918
Book, *ex parte*, 1200
Bookout *v.* Anderson, 999
Bool *v.* Caldwell, 111
Boone *v.* Sirrine, 372, 990
Booth *v.* Farmers', &c. Bank, 652
Boothroyd, *re*, 1204
Boro *v.* Harris. 1026
Bosanquet, *ex parte*, 207
Boston & Colorado Smelting Co. *v.* Smith, 25
Boswell *v.* Dunning, 453
v. Green, 162
Bourne *v.* Freeth, 327
v. Woodbridge, 269
Bowen *v.* Crow, 468

	Page
Bowen *v.* Sutherlin,	448
Bower *v.* Douglass,	356
Bowker *v.* Bradford,	97
Bowler *v.* Huston,	444, 449
Bowling *v.* Dobyns,	668
Bowman *v.* Bailey,	29
v. Cecil Bank,	181
v. Floyd,	124, 748, 1035
v. O'Reilly,	856
v. Spalding,	397
Bowns *v.* Pioneer Tow Line,	42
Bowyer *v.* Knapp,	405
Boyce *v.* Brady,	23
v. Burchard,	904
v. Coster,	686
v. Watson,	171, 449
Boyd *v.* Brown,	927
v. Emerson,	176
v. Foot,	839
v. McCann,	353, 370
v. Mynatt,	838
v. Plumb,	211
v. Webster,	382
Boyers *v.* Elliott,	108, 541, 563
Boylan, *ex parte*,	1202
Boyle *v.* Hardy,	851
Bracken *v.* Kennedy,	816, 942, 943
v. March,	221
Bradbury *v.* Barnes,	520, 624
Bradford *v.* Kimberly,	644
Bradley *v.* Camp,	341
v. Chamberlin,	705
v. Linn,	179
v. White,	19
Bradner *v.* Strang,	254
Bradshaw *v.* Apperson,	28
Brady *v.* Hill,	355
Braithwaite *v.* Britain,	404
Braley *v.* Goddard,	43
Brandon *v.* Robinson,	733
Brasfield *v.* French,	415
Brazee *v.* Poyntz,	208, 418
Breckenridge *v.* Shrieve,	188
Bredow *v.* Mut. Savings Institution,	354
Breen *v.* Richardson,	209
Breneman, *ex parte*,	1061
Brent *v.* Davis,	264
Brewer *v.* Worthington,	759
Brewster *v.* Hamett,	609
v. Hardeman,	162, 355
v. Mott,	272, 848
Brickhouse *v.* Hunter,	686, 833
Bridge *v.* Gray,	173
v. McCullough,	1015
Bridge *v.* Swain,	585
Brien *v.* Herriman,	964
Briggs *v.* Smith,	230
Brigham *v.* Clark,	21
v. Dana,	14, 15, 651
Bright *v.* Sampson,	448
Brink *v.* New Amsterdam Fire Ins. Co.,	32, 100, 175
Brinley *v.* Kupfer,	856
Brisban *v.* Boyd,	343
Bristol *v.* Sprague,	347
Briswalter *v.* Long,	1074
Broaddus *v.* Evans,	229, 1025
Brock *v.* Bateman,	1018
Brockenbrough *v.* Hackley,	426
Brockway *v.* Burnap,	19
Broda *v.* Greenwald,	850
Brooke *v.* Evans,	304
v. Washington,	286, 566
Brooks *v.* Martin,	138, 511
Brown's appeal,	647, 670
Brown, *ex parte*,	1200
Brown, Matter of,	905
v. Agnew,	939
v. Birdsall,	472
v. Broach,	348
v. Chancellor,	361
v. Clark,	344
v. Crandall,	106
v. Fitch,	285
v. Haven,	436
v. Haynes,	265, 715
v. Higginbotham,	41, 354, 986
v. Jewett,	97
v. Lang,	1013
v. Lawrence,	200
v. Litton,	671
v. Marsh,	390
v. McFarland,	648
v. Rains,	116
v. Schackleford,	675
Brownson *v.* Metcalfe,	151, 434
Bruen *v.* Marquand,	209
Brush *v.* Mandrell,	920
Bry *v.* Cook,	884
Bryan *v.* Tooke,	255
Bryany *v.* Hawkins,	373
Bryce *v.* Joynt,	112
Bryden *v.* Taylor,	110
Bryor *v.* Weston,	108
Buchan *v.* Sumner,	559, 563, 1016, 1168
Buchanan *v.* Cheeseborough,	760, 956
v. Curry,	176

	Page
Buchoz *v.* Grandjean,	175
Buck *v.* Mosley,	269
v. Smith,	795
v. Winn,	1022
Buckhasse, *re*,	1167
Buckingham *v.* Burgess,	55, 496
v. Hanna,	621
v. Ludlum,	666, 670, 1017
Buckley *v.* Buckley,	566
v. Carlisle,	943
Bucklin *v.* Bucklin,	395
Buckner *v.* Calcote,	438
v. Lee,	41
v. Reis,	693, 931
Buffalo City Bank *v.* Howard,	341, 364
Buffum *v.* Buffum,	2, 108, 563
v. Scarer,	1025
Bufkin *v.* Boyce,	900
Buford *v.* Neeley,	644, 822
Bulfinch *v.* Winchenback,	66
Bull *v.* Harris,	185
v. Schubert,	19
Bullock *v.* Hubbard,	1026
Bull's Head Bank *v.* McFeeters,	126
Bumpuss *v.* Webb,	938
Bumson *v.* Morgan,	205
Burbank *v.* Haas,	55
Burchard *v.* Boyce,	774, 832
Burckle *v.* Eckhart,	19
Burditt *v.* Grau,	935
Burgen *v.* Dwinal,	468
Burgess *v.* Lane,	53, 112
Burgwin *v.* Hastler,	488
Burleigh *v.* Parton,	219, 265
Burley *v.* Harris,	437, 941
Burnell *v.* Weld,	480
Burnett *v.* Snyder,	44, 63, 64
v. Sullivan,	450
Burney *v.* Boone,	932
Burnham *v.* Hopkinson,	944
v. Whittier,	198
Burnley *v.* Rice,	188, 285
Burns *v.* Hall,	150, 432
v. McKenzie,	355
v. Nottingham,	929
Burnside *v.* Savier,	1000
Burpee *v.* Bunn,	506, 1016
Burr *v.* De La Vergne,	522
v. Morrison,	454
v. Williams,	356
Burrill *v.* Acker,	614
Burt *v.* Lathrop,	67
Burton *v.* Ferris,	287
Burton *v.* Goodspeed,	19
Burtus *v.* Tisdall,	572, 988
Burwell *v.* Mandeville,	337, 338, 994
v. Springfield,	269
Busby *v.* Chenault,	652, 1018
Bush *v.* Cooper,	1200
v. Guion,	691
v. Sinthicum,	94
Bushfield *v.* Wheeler,	564
Butcher *v.* Auld,	881
Butler *v.* Barleson,	893
v. Finck,	20, 103
v. Henry,	58
v. Lemley,	644
v. Stocking,	211
Butterfield *v.* Hemsley,	206
Button *v.* Hampson,	203, 206
Buxton *v.* Edwards,	399, 479
v. Sister,	703
Bybee *v.* Hawkett,	73
Byers *v.* Bourret,	432
Byington *v.* Gaff,	223
Byrd *v.* Fox,	917, 929
Byrne, *ex parte*,	1175
v. Schwing,	436
C. M. Ins. Co. *v.* Ligon,	415
Cabaniss *v.* Clark,	601
Cadwallader *v.* Krolsen,	201
Cady *v.* Sheperd,	205
v. Smith,	433
Cahoon *v.* Hobart,	345
Caldwell *v.* Davis,	806
v. Leiber,	557, 644
v. Scott,	228, 1017
v. Sithens,	301
v. Stileman,	338, 995, 1011
Calk *v.* Orear,	418
Callender *v.* Swett,	111
Calloway *v.* Tate,	836
Calvin *v.* Markman,	437, 946
Camblat *v.* Tupery,	884
Cameron *v.* Blackman,	224
v. Carrilo,	1007
v. Francisco,	644, 647, 648
v. Watson,	688, 708, 883
Cammack *v.* Johnson,	1020
Camp *v.* Fraser,	415, 1008
v. Page,	200
Campbell, *ex parte*,	1200
v. Bowen,	264, 535
v. Dent,	19
v. Hastings,	55, 58, 60, 106, 113
v. Lacock,	757
v. Matheus,	375

Page
Campbell *v.* Steward, 657
v. Traders' Bank, 1058
v. Whitley, 115
Canada *v.* Barksdale, 15
Candler *v.* Stange, 864
Canfield *v.* Hard, 836
Cannon *v.* Copeland, 776
Capelle *v.* Hall, 260
Capen *v.* Barrows, 920
Cargill *v.* Corby, 280
Carillon *v.* Thomas, 610
Carithers *v.* Jarrell, 509
Carlin *v.* Donegan, 661, 857
Carlisle *v.* Mulhern, 559
v. Tenbrook, 657
Carlton *v.* Cummings, 951
v. Ludlow Woolen Mills, 106
Carmichael *v.* Grier, 55, 58, 366
Carroll *v.* Evans, 981
Carper *v.* Hawkins, 354, 857
Carr *v.* Gale, 1200
Carrier *v.* Cameron, 179
Carroll *v.* Gayarre, 173, 426
Carter *v.* Adamson, 758, 940
v. Allen, 1024
v. Beaman, 271
v. Christie, 935
v. Currie, 485
v. Douglass, 106
v. Pomeroy, 219
v. Whalley, 365
Carthaus *v.* Ferres, 175
Casco Bank *v.* Coles 351
Case *v.* Beauregard, 247, 574
v. Cushman, 399, 757
v. Maxey, 935
Casey *v.* Carver, 200
Cash *v.* Tozer, 446
Cassidy *v.* Hall, 34
v. Metcalf, 738
Castle *v.* Bullard, 237
v. Reynolds, 358, 999
Castly *v.* Towles, 816
Caswell *v.* Cooper, 923
Casy *v.* Williams, 922
Catlin *v.* Gilders, 168
Catskill Bank *v.* Messenger, 391
v. State, 182
Causter *v.* Burke, 944
Cayton *v.* Hardy, 167
v. Walker, 847
Chadsey *v.* Harrison, 941
Chaffin *v.* Chaffin, 409
Chaffraix *v.* Laffitte, 42
v. Price, 19

Page
Chamberlain *v.* Bancroft, 356
v. Chamberlain, 525, 562, 563
v. Dow, 350
v. Walker, 927
Chamberlin *v.* Prior, 251
Chambers *v.* Grout, 105
Chambus *v.* Clearwater, 233
Champlin *v.* Tilley, 118
Chance *v.* Chambers, 434
Chandler *v.* Sherman, 166, 859
Channel *v.* Fassitt, 621
Chapin *v.* Clemitson, 515
Chapman *v.* Beach, 977
v. Devereux, 4, 287
v. Forsyth, 1200
v. Lipscomb, 13
v. Wilson, 4
Chardon *v.* Oliphant, 355
Charles *v.* Estleman, 171
Charman *v.* Henshaw, 120
v. McLane, 209
Chase *v.* Bean, 268
v. Deming, 471
v. Garvin, 806, 941
v. Kendall, 354
v. Scott, 580
v. Steel, 506, 1016
v. Vaughan, 395
Chazournes *v.* Edwards, 268
Cheeseman *v.* Sturges, 862
Chemung Bank *v.* Ingraham, 293
Cheney, *ex parte*, 1200
Chenowith *v.* Chamberlin, 181
Chester *v.* Dickerson, 102, 103, 123, 234, 306
Chidsey *v.* Porter, 113
Child *v.* Wofford, 286
Childress *v.* Emory, 145
Childs *v.* Hyde, 488
Chippendale, *ex parte*, 665
Chisholm *v.* Cowles, 68
Chittenden *v.* German American Bank, 214
Chopin *v.* Wilson, 607, 618
Christian *v.* Crocker, 19
v. Ellis, 209, 1016, 1022
Christy *v.* Sherman, 445
Church *v.* First National Bank, 194
v. Sparrow, 190, 191
Cilley *v.* Huse, 503
Cirkel *v.* Ellis 55, 58
Citizens' Bank *v.* Cass, 1072
Citizens' Mutual Ins. Co. *v.* Ligon, 413
City Bank of Brooklyn *v.* McChesney, 367

Page

City Bank of New Haven's Appeal, 471
Cladwell *v.* Palmer, 559
Claflin *v.* Hirsh, 82
Clagett *v.* Kilbourne, 7, 506, 609
Clancy *v.* Craine, 102
Clapp *v.* Rogers, 368
v. Upson, 345
Clark v. Billings, 398
v. Clark, 926
v. Dearborn, 260
v. Dibble, 929
v. Gilbert, 19
v. Gridley, 859
v. Holmes, 287
v. Houghton, 283
v. Howe, 487, 584
v. Hyman, 211
v. Lyman, 611
v. McClelland, 177
v. Miller, 459
v. Rives, 162
v. Stoddard, 175, 448, 450
v. Warden, 665
Clarke's appeal, 937
Clarke *v.* Hogeman, 198
v. Holmes, 470
v. Mills, 938
Clarkson *v.* Carter, 459
Clay *v.* Cottrell. 266
Cleghorn *v.* Johnson, 119
Clement *v.* Brush, 205, 208
v. Clement, 345
Clements *v.* Jessup, 565
v. Mitchell, 114, 651, 883, 992
Cleveland *v.* Woodward, 459, 473
Cline *v.* Wilson, 586
Clough *v.* Huffman, 756, 924
Cobble *v.* Tomlinson, 583
Cochran *v.* Cunningham, 436
v. Perry, 979
Cochrane *v.* Allen. 930
v. Quackenbush, 466
Cocke *v.* Branch Bank, 1
Cockroft *v.* Claflin, 211
Coder *v.* Huling, 516
Codding, *re*, 567
Coddington *v.* Hunt, 342, 368
v. Idell, 516, 644, 666
Cody *v.* Cody, 979
Coffin *v.* Jenkins, 20
v. McCullough, 604
Coffing *v.* Taylor, 631
Cogswell *v.* Davis, 349

Page

Cogswell *v.* Wilson, 105
Colby v. Ledden, 1200
Cole *v.* Pennell, 469
v. Reynolds, 849
Colehour *v.* Coolbaugh, 863
Coleman *v.* Coleman, 940
v. Lansing, 757
v. Marble, 786
v. O'Neil, 251
Coles *v.* Coles, 559, 566
Colgin *v.* Cummins, 670, 672
Colgrove *v.* Tallman, 375
Collamer *v.* Foster, 945
Collier, *re*, 1175, 1178
v. Cross, 112, 179
Collins *v.* Barrett, 464
v. Butler, 506, 546, 1016
v. Decker, 561
v. Hood. 1024, 1065, 1173
Collomb *v.* Caldwell, 1023
Collum *v.* Read, 560
Collyer *v.* Collyer, 856
v. Moulton, 397
Combs *v.* Boswell, 201
Commercial Bank *v.* Lewis, 60, 181, 817
v. Warren, 220
v. Wilkins, 49, 339
Commonwealth *v.* Bennett, 19
Como *v.* Port Henry Iron Co., 366
Comstock *v.* Buchanan, 519
v. White, 722
Conant *v.* Frary, 625, 1016
Condrey *v.* Gilliam, 842
Conery *v.* Hayes, 63, 355
Conklin *v.* Barton, 107
v. Osborn, 356
Conkling *v.* Washington University, 1016, 1168
Conley *v.* Good, 468
Connor *v.* Allen Harr, 999
Conroy *v.* Woods, 570
Consolidated Bank *v.* State, 24, 82
Const *v.* Harris, 166
Converse *v.* McKee, 1016
v. Shambaugh, 117
Cony *v.* Wheelock, 6, 357
Cook, *ex parte*, 1200
v. Beech, 461, 532
v. Bloodgood, 200
v. Carson, 1001
v. Castner, 226
v. Frederick, 120
v. Jenkins, 632, 890
Cook *v.* Penrhyn, 113

	Page
Cooke, *ex parte*,	733
v. Allison,	192
v. Batchellor,	464
Cookingham *v.* Lasher,	287, 470
Cooley *v.* Sears,	467
Coonley *v.* Wood,	391
Coons *v.* Renick,	229
Coope *v.* Bowles,	181
Cooper's appeal,	1026
Cooper *v.* Burns,	62
v. Frederick,	650, 859
v. McClurkan,	266
v. Merriherr,	647, 648
v. Reid,	647, 648
Coorei's appeal,	1026
Copcutt *v.* Merchant,	1011
Cope's appeal,	1026
Corbett, *re*,	1204
Corbin *v.* McChesney,	200
Corey *v.* Perry,	1201
Cornwell *v.* Sandidge,	332, 602
Corps *v.* Robinson,	170, 172
Corwin *v.* Suydam,	229
Coster *v.* Bank of Georgia,	505, 567
v. Clarke,	1025
Cothran *v.* Marmaduke,	20
Cottle *v.* Harrold,	214
v. Leitch,	819, 976
Cotton *v.* Evans,	265
Couillard *v.* Eaton,	920
Course *v.* Prince,	945
Coursen's appeal,	515
Coursen *v.* Hamlin,	644
Coursey *v.* Baker,	179
Cowan *v.* Iowa State Ins. Co.,	581
Cowell *v.* Sikes,	404
Cowles, *ex parte*,	1058
v. Garrett,	69
Cox *v.* Bodfish,	6
v. Delano,	15
v. Harris,	433
v. Peters,	902
v. Russell,	943, 1024
Cragin *v.* Carleton,	112
Craig *v.* Alverson,	173
v. Henderson,	498
v. Smith,	450
Cram *v.* Cadwell,	196
Cramer *v.* Bachman,	645
Crandall *v.* Denny,	150, 432
Crane *v.* Morrison,	1203
v. French,	445
Crary *v.* Williams,	33
Crawford *v.* Austin,	19
Crawford *v.* Baum,	1026
Crawford *v.* Collins,	145
Crawshay *v.* Collins,	587, 671, 684, 1002
v. Maule,	159, 337, 958
Creel *v.* Bell,	443
Cregler *v.* Durham,	345, 952
Creswell *v.* Blank,	489, 1011
Crites *v.* Wilkinson,	228
Crocker *v.* Colwell,	297
Crockett, *ex parte*,	1054
v. Crain,	1016
Croft, *re*,	1203
Crompton *v.* Conkling,	1072
Cronkhite *v.* Herrin,	990
Crook *v.* Davis.	60
Crooker *v.* Crooker,	597, 1016
Croone *v.* Birens,	604, 605
Cropper *v.* Coburn,	506
Crosby *v.* McDermitt,	922
v. Nichols,	196, 565
Cross *v.* Burlington Nat. Bank,	331
v. Langley,	117
Crossley *v.* Taylor,	939
Crosthwait *v.* Ross,	188
Crottes *v.* Frigerio,	942, 943
Croughton *v.* Forrest,	275, 516
Crow *v.* Green,	917
v. Weidner,	1000
Crowell *v.* Western Reserve Bank,	119
Crum *v.* Abbott,	331
Crumless *v.* Sturgess,	173
Crutwell *v.* DeRossett,	209
Cuille *v.* Gasseu,	94
Culberston *v.* Townsend,	491
Culley *v.* Edwards,	25
Cullum *v.* Bloodgood,	162, 216
Cummings *v.* Carsily,	206
v. Mills,	18
Cunliff *v.* Dyerville, &c. Co.,	644, 646
Cunningham *v.* Bragg,	356
v. Gushee,	988
v. Littlefield,	815
v. Smith,	882
v. Smithson,	296
v. Sublette,	226
Currier *v.* Hale,	933
v. Rowe,	929
v. Silloway,	116
v. Webster,	925
Curry *v.* Fowler,	45
v. White,	348
Curtis *v.* Belknap,	459
Curtiss *v.* Hoyt,	605, 790
v. Woodward,	1201

	Page
Cushing *v.* Marston,	461
v Smith,	290
Cutler *v.* Hoke,	214
Cutts *v.* Gordon,	469
Daily *v.* Coons,	55, 58
Dakin *v.* Graves,	930
Dalton City Co. *v.* Dalton Manuf. Co.,	24, 98
v. Hawes,	41
Daly *v.* Ericson,	584
Dana *v.* Conant,	269
Daniel *v.* Daniel,	255
v. Nelson,	355
Daniels, *ex parte*,	166
Darling *v.* March,	259, 358
Darlington *v.* Garrett,	194
Davenport *v.* Gear,	941
v. Runlett,	266
David *v.* Ellis,	403
Davidson *v.* Kelly,	180, 418
v. Knox,	450
v. Wilson,	884, 885
Davis, *ex parte*,	1058
v. Abbott,	467
v. Allen,	345
v. Berger,	175
v. Blackwell,	168, 211
v. Briggs,	360, 512, 933
v. Buchanan,	433
v. Christian,	337, 566, 994
v. Church,	486, 487
v. Cook,	179, 223
v. Hubbard,	151, 432
v. Keyes,	371
v. Merrill,	934
v. Richardson,	191, 255
v. Smith,	258, 566
v. Willis,	366
Davis' Estate *v.* Desauque,	405
Davison *v.* Holden,	7
Day *v.* Lafferty,	206
v. Lockwood,	660
v. Perkins,	566
v. Stevens,	23
v. Wetherly,	409
Dayton *v.* Wilkes,	738, 821
Dean *v.* McFaul,	373
v. Savage,	468
Deardorf *v.* Thacher,	188
DeBerenger *v.* Hammel,	978
DeBerkon *v.* Smith,	270
DeCacessey *v.* Bailey,	1018
Decker *v.* Howell,	15
Deckert *v.* Filbert,	360
Deere *v.* Plant,	332, 736
Deeter *v.* Sellers,	269
Deford *v.* Reynolds,	340, 345
DeGreiff *v.* Wilson,	477
DeGrott *v.* Darby,	460
Deitz *v.* Regnier,	192
DeJarnette *v.* McQueen,	939
DeLeon *v.* Trevins,	124
Delmonica *v.* Guillame,	564
Deming *v.* Colt,	177, 216, 564
Demoss *v.* Brewster,	448
Demott *v.* Swain,	359, 448
Denis *v* Saunders,	43
Denithorn *v.* Hook,	109
Denman *v.* Dosson,	364, 366
Denny *v.* Cabot,	20
v. Metcalf,	437
Densmore Oil Co. *v.* Densmore,	519, 520
Dent *v.* Slough,	247, 823
Denton *v.* Brown,	94
v. Erwin,	855, 882
Denver *v.* Roane,	647, 648
Derby *v.* Gage,	911
v. Gallup,	227
Desha *v.* Holland,	459, 471
v. Smith,	664, 665
Dethlefs *v.* Samson,	586
Deval *v.* McIntosh,	757
Devall *v.* Burbridge,	513
Devaynes *v.* Noble,	474
Deveau *v.* Fowler,	902
Devenney *v.* Mahoney,	561, 564
Devin *v.* Harris,	280
Devine *v.* Mitchum,	559, 566
Devoss *v.* Gray,	67
Dewey *v.* Dewey,	564
Dewit *v.* Staniford,	942
Dexter *v.* Arnold,	665, 672
De Zeng *v.* Bailey,	391
Dial *v.* Neuffer,	97
Dibblee, *ex parte*,	1057, 1063
Dickinson *v.* Bold,	158, 700
v. Dickinson,	341, 366, 910
v. Granger	932
v. Legare,	183, 207
v. Valpy,	327
Dickson *v.* Alexander,	222
Diggs *v.* Brown,	568
Dillon *v.* Brown,	207
Dils *v.* Bridge,	13
Dilworth *v.* Mayfield,	568, 776
Dimond *v.* Henderson,	670, 672, 691
Dinham *v.* Bradford,	666
D'Invilliers' Estate,	1012

Page

Dishon *v.* Schorr, 222
Ditts *v.* Lonsdale, 179
Dix *v.* Otis, 17, 108, 332
Dixon *v.* Barclay, 173
v. Hood, 108
Doak *v.* Swan, 70
Doan *v.* Compton, 1058
Doane *v.* Adams, 651, 675
Dob *v.* Halsey, 259, 266, 267, 269, 274, 436
Dodd *v.* Bishop, 418
v. Dreyfus, 411
Dodge *v.* M'Kay, 206
Dodson *v.* Chambers, 111
Doe *v.* Tupper, 206, 209
Doggett *v.* Dill, 1019
v. Emerson, 1200
v. Jordan, 103
Dole, *ex parte*, 1179
Dommett *v.* Bedford, 733
Donaldson *v.* Bank of Cape Fear, 229, 559
v. Kendall, 202, 206
Donelson *v.* Posey, 597
Dongelot *v.* Rawlings, 173
Doniphan *v.* Gill, 208, 284
Donnelly *v.* Ryan, 193
Doremus *v.* McCormick, 173, 199, 234
Dortie *v.* Dugas, 172, 800
Doty *v.* Bates, 299
Dougal *v.* Cowles, 180
Dougherty *v.* Van Nostrand, 644, 746, 913, 1002
Douglass *v.* Winslow, 580
Doughty *v.* Doughty, 532, 971
Dounce *v.* Parsons, 259
Dow *v.* Phillips, 179
v. Sayward, 607
Dowdall *v.* Lenox, 192, 802
Dower *v.* Stauffer, 506
Dowling *v.* Clarke, 919, 931
v. Clift, 327
Downer *v.* Brackett, 1200
Downing, *ex parte*, 1176
Matter of, 1160
v. Linville, 199
Downs *v.* Jackson, 632
Dowry *v.* Roberts, 354
Doyle *v.* Thomas, 931
Drake *v.* Blount, 1014
v. Elwyn, 103
v. Thyng, 258
Draper *v.* Bissell, 356
Drayer *v.* Sander, 281
Drennen *v.* House, 100, 116

Page

Drew *v.* Ferson, 644
Drewry *v.* Montgomery, 561, 564
Drumright *v.* Philpot, 118, 205
Du Bois *v.* Samson, 188
Dudley *v.* Littlefield, 223
Dumont *v.* Rueprecht, 957
Dunbar *v.* Bullard, 102, 693
Duncan *v.* Clark, 179
v. Lewis, 333
v. Lowndes, 212
v. Tombeckbee Bank, 448
Dundass *v.* Gallagher, 342
Dunham *v.* Gillis, 924
v. Hanna, 1019
v. Murdock, 1025
v. Presby 123
v. Rogers, 20
Dunkerson, *re*, 1167
Dunlap *v.* Limes, 359
v. Watson, 669
Dunlop *v.* Richards, 516, 800
Dunnell *v.* Henderson, 714
Dupre *v.* Bods, 318
Dupuy *v.* Leavenworth, 564, 568
Durant *v.* Rogers, 209, 233, 234
Durbin *v.* Barber, 864, 867
Durham *v.* Hartlett, 758
Duryea *v.* Burt, 15, 597
v. Witcomb, 16
Dutton *v.* Morrison, 979
v. Woodman, 112
Dwight *v.* Simon, 156
Dyas *v.* Dinkgrave, 436
Dyer *v.* Drew, 318

Eads *v.* Mason, 1012
Eager *v.* Crawford, 45, 109
Eagle Mfg. Co. *v.* Jennings, 399
Eakin *v.* Fenton, 850
v. Shumaker, 523
Eames, *ex parte*, 1200
Earbee *v.* Evans, 450
Earl *v.* Hurd, 106
Early *v.* Durborow, 688
v. Reed, 181
Eason *v.* Cherry, 515, 521
Eastman *v.* Clark, 40
v. Wright, 437
Eaton *v.* Taylor, 361
Ebbert's appeal, 562
Ebbinghousen *v.* Worth Club, 67
Eckerly *v.* Alcorn, 371
Edens *v.* Williams, 979
Edgar *v.* Cook, 705, 1033
v. Donally, 553

Page

Effring *v.* Aikin, 815
Edwards *v.* Pitzer, 445
Egberts *v.* Wood, 183, 184, 216, 360, 707
Ege *v.* Kyle, 453
Einstein *v.* Gourdin, 42
Elancy *v.* French, 463
Elder *v.* Hood, 927
Elkin *v.* Green, 277
Elkinton *v.* Booth, 367
Ellicott *v.* Nichols, 355
Elliott *v.* Dudley, 182
v. Stevens, 552
Ellis *v.* Allen, 227, 228
v. Bronson, 343, 352
v. Commander, 903
v. Ellis, 209
v. Jameson, 112
Ellison *v.* Chapman, 925
v. Smoller, 126
Ellsworth *v.* Tartt, 43
Ely *v.* Hair, 205
Emanuel *v.* Bird, 485
Emerson *v.* Durand, 645
v. Harmon, 182
v. Parsons, 955
Emery *v.* Canal Nat. Bank, 1195
v. Wilson, 81
Emmons *v.* Westfield Bank, 22
England *v.* Burt, 117
v. Curling, 696
v. England, 23
Englis *v.* Furniss, 437
Ennis *v.* Williams, 366
Ensign *v.* Briggs, 554, 559
Epps *v.* Dillaye, 366
Erwin's appeal, 564
Espy *v.* Comer, 426
Estabrook *v.* Messersmith, 234
v. Smith, 461
Estes *v.* Whipple, 941
Etheridge *v.* Binney, 294, 472
Eusininger *v.* Marvin, 179
Evans *v.* Carey, 390, 481
v. Clapp, 652
v. Corriell, 172
v. Evans, 902
v. Fisher, 432
v. Gibson, 516
v. Hansen, 542
v. Montgommery, 884
Everett *v.* Chapman, 103, 280, 285
v. Stone, 1200
Everingham *v.* Ensworth, 196, 199, 274

Page

Everit *v.* Strong, 207
Everitt *v.* Watts, 841
Everson *v.* Gehrman, 445
Ewing *v.* Tripe, 347
Exchange Bank *v.* Ford, 474
v. Tracey, 1000

Fabian *v.* Callahan, 109
Fagin *v.* Long, 332
Fagg *v.* Hambel, 391
Fail *v.* McKee, 30
Fairbank *v.* Leary, 695, 738
Fairchild *v.* Fairchild, 102, 561, 563
v. Valentine, 825
Faler *v.* Jordan, 1024
Falkland *v.* St. Nicholas Nat. Bank, 1201
Fall River, &c. Bank *v.* Sturtevant, 265
Fall River Whaling Co. *v.* Borden, 102, 554, 561, 564
Fanchon *v.* Bibb Furnace Co., 175
Fanning *v.* Chadwick, 517, 929
Fant *v.* West, 284
Farber *v.* Levi, 823
Farmen *v.* Brooks, 513
Farmer, *In re*, 561, 1163
v. Samuel, 520
Farmers', &c. Bank *v.* Green, 343
Farmers' Ins. Co. *v.* Ross, 41
Farnum, *ex parte*, 1197
v. Patch, 7
Farr *v.* Johnson, 594
v. Wheeler, 111
Farrar *v.* Haselden, 585
Farrer *v.* Farrer, 644
Farwell *v.* Davis, 472, 473
v. Tyler, 938
Faulds *v.* Yates, 564
Faulkner *v.* Whitaker, 432, 433
Faver *v.* Briggs, 448
Fay *v.* Davidson, 17, 42
v. Duggan, 443
v. Finley, 937
v. Noble, 7
Featherstonhaugh *v.* Fenwick, 698, 991
Feigley *v.* Sponeberger, 224
Felbretch *v.* Armstrong, 366
Felder *v.* Wall, 857
Felichy *v.* Hamilton, 4, 13, 65
Fellows *v.* Greenleaf, 625
v. Wyman, 357
Felton *v.* Reid, 585
Fenn *v.* Bowles, 748, 1005
v. Harrison, 270
v. Simpson, 118

Page
Fenton *v.* Folger, 506, 1024
Ferero *v.* Buhlmeyer, 963
Ferguson *v.* Gordon, 219
v. Hasz, 566
v. Hite, 848
v. King, 452
Ferris *v.* Shaw, 67
Fessler *v.* Hickernell, 860
Fick *v.* Mulholland, 116
Field *v.* Chapman, 574
v. Tenney, 108
Fielden *v.* Lahens, 182
Filley *v.* McHenry, 116, 269, 586, 609, 994, 1016, 1021
v. Phelps, 994
Fillyall Laverty, 1011
Findlay *v.* Stevenson, 222
Finlay *v.* Fay, 625
v. Stewart, 918, 931
Finney *v.* Allen, 468
v. Turner, 944
First Nat. Bank *v.* Breeze, 220
v. Carpenter, 211
v. Morgan, 179
v. Newton, 346
Fish *v.* Gates, 479
v. Herrick, 506, 609, 1016, 1024
v. Miller, 181
Fisher *v.* Currier, 1065
v. Murray, 182
v. Pender, 208
v. Sweet, 943
Fisk *v.* Copeland, 170
Fiske *v.* Hunt, 1200
Fitch *v.* Hall, 18
v. Harrington, 56, 64, 110
v. Stamps, 218
Fitchburn *v.* Boyer, 206
Fithian *v.* Jones, 1036
Fitz *v.* Reichard, 515
Fitzgerald *v.* Christt, 577
Flagg *v.* Stowe, 6, 594, 601
Flammer *v.* Green, 975
Flannagan *v.* Alexander, 275
Flannigan *v.* Maddin, 991
Flannery *v.* Anderson, 449
Fleming *v.* Billings, 1016
v. Dunbar, 206
Flemming *v.* Prescott, 181, 259
v. Lawhorn, 207
Fleshman *v.* Collier, 107
Fletcher *v.* Anderson, 265, 564
v. Morey, 1083
v. Pollard, 686, 883
Page
Fletcher *v.* Reed, 336, 705
Flint *v.* Eureka Marble Co., 29
Florance *v.* Bridge, 359
Florida Territory *v.* Redding, 999
Flournoy *v.* Williams, 116
Floyd *v.* Miller, 348
v. Wallace, 287
Foerster *v.* Kirkpatrick, 434
Fogarty *v.* Cullen, 413, 485
Fogerty *v.* Jordan, 117
Fogg *v.* Greene, 112
v. Johnstone, 957
Folk *v.* Wilson, 405
Foltz *v.* Powrie, 356
Fontaine *v.* Lee, 348
Foot, *re*, 1172
v. Sabin, 259, 267
v. Tabir, 211
Forbes *v.* Davison, 108
v. Scannell, 177
Ford *v.* Smith, 45
Fordyce *v.* Shriver, 662
Forkner *v.* Stuart, 184, 207
Forney *v.* Adams, 276
Forrer *v.* Forrer, 522
Forrester *v.* Oliver, 586
Forsyth, *re*, 1172
v. Merritt, 1091, 1109
Forster *v.* Lawson, 464
Fortune *v.* Brazier, 443, 717
Fosdick *v.* Van Horn, 472
Foster, *ex parte*, 1054, 1200
v. Andrew, 266
v. Barnes, 566
v. Donald, 684
v. Fifield, 175
v. Goddard, 650, 714
v. Hall, 963, 1016
v. Rison, 843, 846
Fourth Nat. Bank *v.* Atheimer, 40
v. Carolton Railroad, 625, 775
Fowler *v.* Bailley, 564
v. Harrington, 584
Fox, Appeal of, 1020
v. Clifton, 103, 327
v. Hanbury, 612, 613, 980
v. Norton, 205, 206
Francis, *re*, 45
Francis, The, 146, 529
Francis *v.* Dickel, 467
v. Smith, 332
Francklyn *v.* Sprague, 604
Frank *v.* Peters, 602
Frankland *v.* McGusty, 27
Franklin *v.* Robinson, 644

Page

Frazier *v.* Frazier, 644
Frederick *v.* Cooper, 628, 815
Freeman *v.* Bloomfield, 31, 621
v. Carhart, 172, 448
v. Falconer 352
v. Finnall, 815
v. Freeman, 872
v. Ross, 181, 259
Freligh *v.* Miller, 621
French *v.* Chase, 1020
v. Lovejoy, 275, 1022
v. Price, 72
v. Rowe, 225
Frentress *v.* Markle, 395
Frigerio *v.* Crottes, 686
Frink *v.* Ryan, 930
Frith *v.* Lawrence, 599
Fromme *v.* Jones, 162
Fronebarger *v.* Henry, 209
Frost *v.* Hanford, 255
v. Shackleford, 460
v. Walker, 110
Frothingham *v.* Seymour, 82
Froun *v.* Davis, 229
Fuller *v.* Benjamin, 780
v. Percival, 268
Fulton *v.* Williams, 418, 532
Funk *v.* Leachman, 826
Furnival *v.* Weston, 176

Gaar *v.* Higgins. 367
Gadsen *v.* Carson, 1016
Gage *v.* Parmele, 665, 670, 691, 807
v. Rollins, 436, 456
Gaines *v.* Catron, 568
Gaither *v.* Caldwell, 443
Galbraith, *ex parte*, 1061, 1066
v. Gedge, 209, 559, 566
Gale *v.* Miller, 195, 348
Gallagher's appeal, 1018
Gallicott *v.* Planters' and Mechanics' Bank, 356, 369
Gallop *v.* Newman, 25
Gallot *v.* McCluskey, 436
Galloway *v.* Hughes, 105, 161, 697
Galt *v.* Calland, 283
Galway *v.* Fullerton, 574
v. Mathew, 262
Gammon *v.* Huse, 398
Gannett *v.* Cunningham, 353
Gano *v.* Samuel, 190
Gansevoort *v.* Kennedy, 951
v. Williams, 266
Ganson *v.* Lathrop, 1016
Gantt *v.* Gantt, 102

Page

Gard *v.* Clark, 359
Gardenir *v.* Bataille, 955
Gardenhire *v.* Smith, 20
Gardom, *ex parte*, 211
Garner *v.* Tiffany, 433
Garretson *v.* Weaver, 899
Garrett *v.* Handley, 458
Gasset *v.* Morse, 1059
Gaston *v.* Kellogg, 514
Gates *v.* Bennett, 214
v. Pollock, 210
Gauger *v.* Pantz, 924
Gaut *v.* Reed, 721
Gay, *ex parte*, 1202
v. Bowen, 355
v. Johnston, 299, 469, 1017
v. Siebold, 126
v. Waltman, 176
Gaylor *v.* Peterson, 855
Geddes' appeal, 807
Geery *v.* Cockroft, 228
Gehecbe *v.* Stanley, 469
Genese *v.* Cooper, 740
George *v.* Tate, 282
Geortner *v.* Trustees, 903
Gerard *v.* Busse, 203, 206
v. Gateau, 974
German Mining Co., *In re*, 665
Getty *v.* Devlin, 102
Gibson *v.* Moore, 930
v. Stevens, 609
v. Wardon, 205
Gilbert, *ex parte*, 1076
v. Whidden, 108, 110
Gilchrist *v.* Brande, 113, 366, 439
Gildersleeve *v.* Mahony, 182
Gilhooly *v.* Hart, 644, 645, 666, 667
Gill *v.* Ferris, 24, 397
v. Geyer, 675
Gillapsy *v.* Peck, 1024
Gillbank *v.* Stevenson, 22
Gillet *v.* Hall, 814
Gillies *v.* Cone, 1058
Gilman *v.* Cosgrove, 151, 433
v. Vaughan, 665, 670
Gilmore *v.* Merritt, 28
v. North American Land Co., 506
Gilpin *v.* Temple, 103, 105
Girdley *v.* Connor, 909
Given *v.* Albert 222, 285
Givin *v.* Selbey, 574
Glasscock *v.* Smith, 998
Glassington *v.* Thwaites, 530
Gleason *v.* Clark, 355

Page

Gleason *v.* White, 942
Glenn *v.* Gill, 820, 1016
v. Hebb, 856
Glover *v.* Tuck, 919
Goble *v.* Howard, 931
Goddard *v.* Pratt, 106, 353
Goell *v.* Morse, 71
Goepper *v.* Kingsinger, 552
Golden, *ex parte*, 274
Goldsborough *v.* McWilliams, 941
Goldsmith *v.* Sachs, 917
Gomersall *v.* Gomersall, 944
Good *v.* McCartney, 20
Goodburn *v.* Stevens, 337, 994, 1004
Goode *v.* McCarty, 269
Gooden *v.* Morrow, 372, 481
Goodenough *v.* Duffield, 172
Goodenow *v.* Jones, 325
Goodman *v.* Einstein, 530
v. Whitcomb, 976, 977
v. White, 167
Goodwin *v.* Richardson, 515, 547, 1016, 1024
Gordon *v.* Bankard, 116
v. Coolidge, 237
v. Freeman, 196
v. Gordon, 551
v. Janney, 151, 433
v. Joslin, 406
v. Tyler, 522
Gorman *v.* Russell, 6, 509, 604, 962
Gossett *v.* Weatherly, 884
Gould *v.* Gould, 462
Goulding *v.* Bain, 899
Gouthwaite *v.* Duckworth, 324
Gover *v.* Hall, 957
Gowan *v.* Jeffries, 906
Grady, *ex parte*, 1075
Grady *v.* Robinson, 33, 205, 341, 398
Grafton Bank *v.* Moore, 106, 110
Graham *v.* Harris, 437
v. Holt, 941
v. Meger, 232
v. Stark, 1055
Gram *v.* Seton, 203
Granger *v.* McGilvra, 353
Grant *v.* Bryant, 674, 713
v. Holmes, 391
Grasser *v.* Stellwagen, 228
Gratz *v.* Bayard, 337, 994
Graves *v.* Kellenberger, 188
v. Merry, 356, 369
Gray *v.* Brown, 225, 390
v. Cropper, 252
v. Gibson, 455

Page

Gray *v.* Palmer, 62, 102, 104, 286, 583, 990
v. Portland Bank, 515, 920
v. Ward, 179
Grazebrook *v.* McCreedie, 446
Great Western Tel. Co., *re*, 532
Greeley *v.* Wyeth, 277
Green *v.* Burton, 255
v. Busley, 4
v. Caulk, 113
v. Chapman, 437
v. Deakin, 274
v. Pyne, 468, 476
v. Ross, 507, 669
Greene *v.* Breck, 506
Greenleaf *v.* Quincy, 426
Greenwald *v.* Kaster, 391
Greenwood *v.* Brink, 126
v. Sias, 117
Gregg *v.* Fisher, 179, 190, 191
v. James, 195
Greggs *v.* Clark, 594
Gregory *v.* Dodge, 4
v. Harmon, 448
v. Martin, 119
Gribbin *v.* Thompson, 467
Gridley *v.* Conner, 359, 669, 774, 795, 855, 896
v. Dole, 942, 943
Grieff *v.* Kirk, 450
Grier *v.* Hood, 447
Griffin *v.* Orman, 756, 943
v. Samuel, 467
Griffith *v.* Buck, 604, 756, 925
v. Buffum, 222, 285
v. Chew, 437
Griggs *v.* Clark, 855, 1005
Grigsby *v.* Nance, 932
Grinman *v.* Baton Rouge Co., 364
Grissom *v.* Moore, 585
Griswold *v.* Haven, 251
v. Waddington, 963, 982, 983
Grobb's appeal, 560
Groesbeck *v.* Brown, 446
Grooves *v.* Tollman, 31
Grove *v.* Fresh, 856, 884
v. Miles, 658
Grund *v.* Van Vleck, 232
Guidon *v.* Robson, 453
Guilbeau *v.* Melancon, 562
Guild *v.* Leonard, 573
Gulick *v.* Gulick, 172, 929
Gulke *v.* Uhlig, 107
Gullat *v.* Tucker, 276
Gullion *v.* Peterson, 245

	Page
Gunnell *v.* Bird,	859
Gunter *v.* Jarvis,	488, 585
Gurler *v.* Wood,	232
Gurr *v.* Martin,	23
Guyton *v.* Flack,	571, 823, 906
Guzzam *v.* Bebee,	467
Gwinn *v.* Rooker,	205, 206
Gyger's appeal,	666, 670
Haas *v.* Roat,	42
Hackley *v.* Hastie,	355
Haddock *v.* Crocheron,	348
Hafer, *ex parte*,	1203
Hagar *v.* Stone,	459
Hagendobler *v.* Lyon,	360, 482
Haggerty *v.* Granger,	183
Haight *v.* Burr,	899
Haile *v.* York,	32
Haines *v.* Hollister,	775
Haldeman *v.* Bank of Middletown,	179, 191
Halderman *v.* Halderman,	942
Hale *v.* Brennan,	113
v. Henric,	562
v. Van Saun,	449
v. Wilson,	929
Halfhide *v.* Fenning,	761, 763, 764
Hall, *ex parte*,	1065
v. Clagett,	354, 691
v. Cook,	161
v. Edson,	19
v. Green,	161
v. Jones,	371, 394, 408
v. Lanning,	359
v. Leigh,	71
v. Logan,	945
Hallack *v.* March,	175
Haller *v.* Williamowicz,	660, 716, 817
Halliday *v.* Bridewell,	44
v. M'Dougal,	106, 310
Halls *v.* Coe,	199
Halsey *v.* Whitney,	162
Halstead *v.* Schmelzel,	940
v. Shepard,	267, 357
Hamill *v.* Hamill,	905
v. Purviss,	210
v. Willett,	572
Hamilton *v.* Buxton,	468
v. Hamilton,	919, 932
v. Hodges,	266
v. Seaman,	356
Hamilton *v.* Somers,	179, 306, 355
Hamersley *v.* Lambert,	414, 485
Hamlin, *re*,	1202
Hammond *v.* Aiken,	344
v. Coolidge,	1202
v. Douglas,	587, 1003
v. St. John,	491, 585
Hamper's appeal,	645
Hancock *v.* Hintrager,	55, 58
Hanks *v.* Barber,	937
Hanna *v.* Flint,	19
v. Wray,	1001
Hansmith *v.* Espy,	433
Hanway *v.* Robertshaw,	586
Hapgood *v.* Cornevell,	604
Hardy *v.* Mitchell,	1016
Harman *v.* Fishar,	441
Harp *v.* Tomlinson,	332
Harper *v.* Fox,	507
v. Wrigley,	199
v. Lamping,	882
Harrick *v.* Ames,	815
Harris *v* Harris,	939
v. Hillegass,	22, 785
v. Lindsay,	398, 399
v. Miller,	284
v. Pearce,	156
v. Schultz,	315
v. Sessler,	58
Harrison *v.* Clare,	391
v. Farrington,	809, 847, 848
v. Jackson,	176, 203, 207
v. Righter,	823
v. Story,	1084
Hart *v.* Clark,	604
v. Finigan,	841
v. Tomlinson,	736
v. Withers,	203, 206
v. Woodruff,	991
Hartley *v.* Kirlin,	357
v. White,	276
Hartman *v.* Woehr,	33, 827, 975
Hartness *v.* Thompson,	469
Hartough, *ex parte*,	1067, 1070
Hartung *v.* Siccardi,	498
Harvey *v.* Childs,	18
v. McAdams,	231
v. Varney,	654, 820, 896
Harwood *v.* Edwards,	176
Hasbrouck *v.* Childs,	687
Haskell *v.* Adams,	939
Haskins *v.* Alcott,	150, 433
v. Burr,	33
Haskinson *v.* Elliott,	191, 222
Haslet *v.* Street,	359, 444, 452
Haslett *v.* Wotherspoon,	6
Hasley *v.* Whitney,	225

Page

Hastings *v.* Hopkinson, 108, 309
Hatch *v.* Foster, 565
v. Wood, 472
Hatchett *v.* Blanton, 394
Hatheway's appeal, 169
Hatton *v.* Stewart, 219
Hatzenbuhler *v.* Lewis, 460
Hauff *v.* Howard, 561, 563
Haughey *v.* Strickler, 117
Haughton *v.* Eustis, 1200
Hauser *v.* Smith, 453
Havana, &c. R. R. Co. *v.* Walsh, 285
Haven *v.* Wakefield, 946
v. White, 437
Havens *v.* Hussey, 184
Hawes *v.* Dunton, 179
Hawley *v.* Hurd, 471
Hawkins *v.* Appleby, 234, 243
v. Hastings Bank, 214
v. Waller, 243
Hawks *v.* Hinchcliff, 420
Hayes *v.* Baxter, 220
v. Heyer, 822
Haynes *v.* Carter, 369
v. Seachrest, 205
Hayward *v.* French, 191
Haywood *v.* Harmon, 218
Hazard *v.* Caswell, 125, 363
v. Hazard, 12, 18, 820
Hazelhurst *v.* Pope, 392, 933
Head *v.* Sleeper, 180, 470
Heaston *v.* Cincinnati, &c. R. R. Co., 151, 434
Heartt *v.* Corning, 170, 883
v. Walsh, 196, 363
Heath *v.* Gregory, 284
v. Waters, 644, 646, 999
Heavilon *v.* Heavilon, 943
Heckert *v.* Fegely, 42
Hedge's appeal, 12
Heenan *v.* Nash, 296
Hefferman *v.* Brenhan, 448, 449
Heffron *v.* Hanaford, 171, 259
Hegeman *v.* Hegeman, 126
Heinsheimer *v.* Shea, 1058
Heirn *v.* McCaughan, 232
Heintz *v.* Cahn, 454
Hellmen *v.* Mendel, 647
Henderson *v.* Barbee, 206
v. Haddon, 617
Hendrie *v.* Berkowitz. 259
Henecy, *ex parte*, 733
Henessy *v.* Western Bank, 177
Henn *v.* Walsh, 815, 962

Page

Hennegin *v.* Wilcoxon, 942, 943
Henry, *re*, 1079
v. Henry, 1023
Henry County *v.* Gates, 203
Henshaw *v.* Root, 107
Herbert *v.* Hanrick, 205
v. Odlin, 218
Hermanns *v.* Duvigneaud, 72, 181
Heroy *v.* Van Pelt, 341
Herrick *v.* Ames, 827
v. Conant, 358, 446
Heshion *v.* Julian, 29
Hester *v.* Baldwin, 1185
v. Lumkin, 265
Hewitt *v.* Kuhl, 889
v. Northrup, 1091
v. Patrick, 447
v. Rankin, 561, 564
Heydon *v.* Heydon, 612
Heye *v.* Bolles, 186
Hibbler *v.* DeForrest, 188
Hickerson *v.* McFaddin, 754
Hickman *v.* Kunkle, 265
v. Reineking, 175, 265
Hicks *v.* Bronton, 468
v. Crain, 60
v. Maness, 468
v. Wyatt, 353
Hier *v.* Odell, 368
High, *ex parte*, 1156
Higinbotham *v.* Holme, 733
Hill, *ex parte*, 733
v. Beach, 566, 610, 1016
v. Clarke, 936
v. King, 665
v. Marcy, 405
v. Marsh, 436
v. Matta, 645, 881
v. M'Neil, 490
v. Packard, 459
v. Palmer, 917
Hilliker *v.* Loop, 459
Hillisberg *v.* Burthe, 669
Hills *v.* Bailey, 285
v. Ross, 452
Hine *v.* Bowe, 463
Hinman *v.* Little, 60
Hinton, *ex parte*, 733
v. Odenheimer, 632
Hirsch *v.* Adler, 781
Hiscock *v.* Phelps, 561, 564
Hitchcock *v.* St. John, 185
Hite *v.* Hite, 648, 669
Hoard *v.* Clum, 994
Hobart *v.* Ballard, 906

Page

Hobart *v.* Howard, 926
v. Lemon, 97
Hobbs *v.* Wilson, 758
Hodges *v.* Daws, 19
v. Harris, 162, 207, 216
v. Holeman, 597, 605
v. Parker, 665, 666, 918
Hodgman *v.* Smith, 19
Hodgson, *ex parte*, 733
v. Baldwin, 640
Hodson *v.* Porter, 206
Hogan *v.* Reynolds, 197
v. Calvert, 923
Hogendobler *v.* Lyon, 492
Hogg *v.* Orgill, 179
Hogle *v.* Lowe, 564
Holande *v.* Butterworth, 346
Holbrook *v.* St. Paul F. & M. Ins. Co., 145
v. Wight, 222
Holbrooke *v.* Oberne, 19
Holden *v.* Bloxum, 301
v. French, 20
v. M'Makin, 550, 746
v. Peace, 522, 668
Holderness *v.* Schackle, 581
Holifield *v.* White, 15, 610
Holladay *v.* Elliot, 820, 964
Holland *v.* Butler, 432, 433
v. Fuller, 586, 999
v. Long, 366
Hollenback *v.* Moore, 247, 248
Hollis, *ex parte*, 1058
Hollister *v.* Barkley, 659
Holloway *v.* Brinkley, 15
v. Turner, 1017
Holman *v.* Carhart, 467
v. Nance, 930
Holmes *v.* Burton, 300
v. Caldwell, 373
v. De Camp, 437, 584
v. Hawe, 565, 815
v. Hubbard, 760
v. Kortlander, 219
v. McCray, 955
v. McDowell, 999
v. Old Colony R. R. Co., 98
v. Self, 561
v. Shards, 355
v. United States Ins. Co., 72
Holt *v.* Kernodle, 436
v. Simmons, 188, 347
Holtgreve *v.* Wilkner, 368
Holton *v.* Holton, 1016
Holyoke *v.* Mayo, 929

Page

Homer *v.* Abbe, 776
v. Wood, 199
Honore *v.* Colmesnil, 512, 594, 665, 668, 674, 691, 908
Hood *v.* Spencer, 755
Hook *v.* Stone, 181
Hooley *v.* Gieve, 363, 1006, 1036
Hoopers *v.* McCan, 399, 411
Hope *v.* Cust, 211
Hopkins, *re*, 1072
v. Carr, 394
v. Forsythe, 72
v. Smith, 121
v. Watt, 806
Horbach *v.* Huey, 361, 532
Horn *v.* Newton City Bank, 188
Horsey *v.* Heath, 182, 1012
Horton *v.* Child, 207, 418
Horton's appeal, 979
Hosack *v.* Rogers, 419
Hosmer *v.* Burke, 468
Hotchin *v.* Kent, 167
Hotchkiss *v.* Ladd, 300
v. Lyon, 175
Houseal's appeal, 1016
Houser *v.* Irvine, 427
How *v.* Kane, 421, 473
Howard *v.* Jones, 609
v. Patrick, 113
Howe *v.* Howe, 17
v. Learing, 747
v. Thayer, 342
Howell *v.* Adams, 341
v. Brodie, 327
v. Harvey, 658, 776, 951, 961, 964, 974
v. Reynolds, 486, 520
v. Wilcox & Gibbs S. M. Co., 265
Hoxie *v.* Carr, 533, 561, 566
Hoyt, *ex parte*, 1061
v. McLaughlin, 851
v. Murphy, 497
v. Sprague, 511
Hubbard *v.* Curtis, 1024
v. Guild, 354
v. Matthews, 703
Hubbell *v.* Skiles, 490
v. Wood, 31
v. Woolf, 33
Hubble *v.* Perrin, 1016
Huckabee *v.* Nelson, 33
Hudgins *v.* Lane, 480
Hudson *v.* McKenzie, 169
Hudson *v.* Simon, 105

	Page
Huff *v.* Lutz	1001
Hughes, *re*,	1204
v. Boring	463
v. Ellison,	181
v. Waldo,	331
v. Walker,	151, 432
Hughuley *v.* Morris,	13
Hulett *v.* Fairbanks,	15
Human *v.* Cuniffe.	282
Humes *v.* O'Bryan,	118, 168
Humphries *v.* Chastien,	357
Hunt *v.* Chapin,	188
v. Gookin,	818
v. Hall,	341, 346
v. Pooke,	1067
v. Rogers,	938
v. Semonin,	437
v. Thibbets,	740
Hunter *v.* Little,	645
v. Wayrick,	166
v. Whitehead,	102, 800
Huntington *v.* Lyman,	265
v. Potter,	344
Hupp *v.* Hupp,	498
Hurd *v.* Haggerty	191
Hurlbut *v.* Post,	472
Hurst *v.* Hill,	355
Hust *v.* Clark,	276
Husted *v.* Ingraham,	283
Hutchins *v.* Bank of Tenn.,	369
v. Childress,	172, 174
v. Gilman,	198
v. Hudson,	191, 366
v. Turner,	191
Hutchinson *v.* Onderdonk,	654
v. Smith, 245, 321, 360,	1000
Hutton *v.* Laws,	1004
Hyams *v.* Rogers,	169
Hyde *v.* Easter,	820
Hyer *v.* Burdett,	824
v. Norton,	333
Hynes *v.* Stewart,	804
Hyrschfelder *v.* Keyser,	228
Iddings *v.* Pierson,	342, 860
Ihmsen *v.* Lathrop,	958
v. Negley,	260
Iliff *v.* Brazil,	72
Illinois, &c. R. R. Co. *v.* Owens,	37, 285
Inbusch *v.* Farwell, 505,	1016, 1019
Indiana, &c. Co. *v.* Bates,	564
Ingalls, *ex parte*,	1173
Inglebright *v.* Hammond,	106
Ingraham *v.* Foster	804
Irby *v.* Brigham,	107
v. Graham,	1024
v. Vining,	350
Irvin *v.* Forbes,	535
v. Nashville, &c. Ry. Co.,	13
Irwin *v.* Bidwell,	33
v. Williar,	168
Isaacs, *re*,	1172
Isler *v.* Baker, 341,	356, 970
Ives *v.* Miller,	942
Jackson *v.* Alexander,	471, 472
v. Clymer,	1023
v. Geese,	914, 962
v. Holloway,	269
v. Johnson,	666
v. King,	1012
v. Robinson,	72
v. Standford,	208
Jackey *v.* Butler,	612
Jacobs *v.* M'Bee,	207
Jacquin *v.* Buisson,	903, 994
Jacques *v.* Greenwood,	1025
v. Marquand,	245
James *v.* Bostwick,	206, 693
v. Stratton,	607
January *v.* Pontz,	1029
Jarman *v.* Ellis,	201
Jarvis *v.* Brooks,	565, 1016
v. Hyer,	615
Jefferys *v.* Smith,	532
Jeffreys *v.* Coleman,	205
Jenkins *v.* Peckinpaugh,	659
Jenness *v.* Carleton,	994, 999
v. Smith,	485
Jennings *v.* Chandler,	903, 994
v. Estes,	172
v. Rickard,	827
Jessup *v.* Cook,	881, 920
Jewett, *ex parte*,	1176, 1185
re,	60, 437, 1073
v. Brooks,	928
Johns *v.* Rattin,	205, 206
Johnson's appeal,	525
Johnson, *ex parte*,	1057
v. Berlizheimer,	999
v. Bernheim,	224, 255
v. Byrd,	468
v. Clark,	565
v. Crichton,	276
v. Hartshorne,	666, 670, 994
v. Robinson,	177
v. Rogers,	609
v. Smith,	150, 433

Page

Johnson *v.* Totten, 366
Johnston's appeal, 62
Johnston, *re*, 1202
v. Brown, 147
v. Dutton, 189, 264, 535
v. Freer, 777
v. Warden, 113
Jones' appeal, 562
Jones' Case, 196, 199
Jones *v.* Bailey, 175
v. Blair, 497
v. Booth, 268
v. Call, 13
v. Caperton, 318
v. Clark, 693
v. Dexter, 991
v. Fegely, 27
v. Hardesty, 488, 1009
v. Hurst, 444
v. Jones, 594, 650, 665, 674, 841, 861
v. Lusk, 269, 1017
v. Neale, 208
v. Noy, 966
v. Sleeper, 1059
v. Thompson, 507, 609
Jordan, *In re*, 245
v. Miller, 900
v. Wilkins, 24, 461
Joseph *v.* Fisher, 106
Joslyn *v.* Taylor, 490
Judd *v.* Hubbell, 470
Judge *v.* Braswell, 188
Judson *v.* Adams, 20
Junck *v.* Hezeau, 857
Justices *v.* McLaren, 999, 1006

Kahn *v.* Smelting Company, 622
Kaskaskia Bridge Co. *v.* Shannon, 174
Kasson *v.* Brocker, 206
Kauffman *v.* Fisher, 426, 446
Kayser *v.* Maughan, 15, 65
Kean *v.* Johnson, 796
Kearney *v.* Fenner, 448
v. Snodgrass, 327
Keeley *v.* Greenleaf, 516
Keith *v.* Fink, 395
v. Pratt, 490
Kelleher *v.* Tisdale, 105
Keller *v.* Hicks, 470
v. West, 207
Kelley *v.* Foot, 235
v. Greenleaf, 275
v. Hurlbert, 346
Kellogg *v.* Fancher, 275

Page

Kellogg *v.* Totten, 550, 739
Kelly *v.* Baker, 183
v. Devlin, 104, 123
v. Eckford, 835, 885
v. Greenleaf, 691
v. Kauffman, 632
v. Murphy, 343
Kelsey *v.* Hobby, 753
Kelton *v.* Leonard, 259
Kemeys *v.* Richards, 272
Kemp *v.* Carnley, 177
v. Coffin, 356
Kenan *v.* Starke, 455
Kendall *v.* Rider, 561, 1023
Kendrick *v.* Campbell, 355
v. Tarbell, 299, 674, 853
Kennebeck Co. *v.* Augusta Ins. &c. Co. 213
Kennedy *v.* Bohannon, 341
v. Kennedy, 961
v. Lee, 550
v. McFadon, 942
v. Richey, 491
v. Shilton, 847
Kenney *v.* Atwater, 73, 366
Kenniston *v.* Avery, 428
Kent *v.* Majoiner, 126
v. Wells, 468
Kerr *v.* Potter, 19
v. Sharp, 245
Kerrick *v.* Stevens, 702
Kershaw *v.* Matthews, 700
Ketcham *v.* Clarke, 341, 346, 623
Ketchum, *In re*, 233
v. Durkee, 603, 817
Kidd *v.* Brown, 447
Kidder *v.* McIllhenny, 934
v. Page, 1017
Kill *v.* Hollister, 763
Killam *v.* Preston, 929
Kimball *v.* Gearhart, 604
v. Hamilton, &c. Ins. Co., 182, 228
v. Lincoln, 532, 644, 647, 999
v. Thompson, 572
Kimble *v.* Seal, 839
Kimbro *v.* Bullitt, 163, 188
Kimmins *v.* Wilson, 81, 801
King *v.* Barbour, 116
v. Faber, 266
v. Haines, 467
v. Hamilton, 553, 644, 645
v. Leighton, 339
v. Wartelle, 686
v. Weeks, 505

Page

King *v.* Whiton, 516, 862
Kingman *v.* Spurr, 621, 625, 627
Kinlock *v.* Hamlin, 920
Kinney *v.* Robinson, 821
Kinsler *v.* McCants 585
Kinsman *v.* Dallham, 298
v. Parkhurst, 521
Kirk *v.* Hiatt, 173, 359
v. Hodgson, 535
Kirkby *v.* Ingersoll, 899
Kirkman *v.* Snodgrass, 366
Kirkpatrick *v.* Turnbull, 179
Kirby *v.* Carpenter, 1016
v. Common, 469
v. Hewitt, 352
v. Ingersoll, 183
Kitner *v.* Whitlock, 146, 220
Klock *v.* Beckman, 174
Knapp *v.* Edwards, 885
v. McBride, 179, 337, 858, 994
Knight, *re*, 1177
v. Ogden, 611
Knott *v.* Knott, 561
Knowlton *v.* Reed, 1033
Knox *v.* Schepler, 486, 506, 586
Kockler *v.* Brown, 931
Koenig *v.* Adams, 705
Koningsburg *v.* Launitz, 577
Kountz *v.* Holthouse, 332
Kramer *v.* Arthurs, 7, 610
Kratzer *v.* Lyon, 163, 438
Kull *v.* Thompson, 198
Kyle *v.* Roberts, 304

Lacy *v.* Hall, 565
v. Le Bruce, 946
Ladd *v.* Billings, 606
v. Griswold, 604
Ladue *v.* Hart, 497
Laffan *v.* Naglee, 522
Lafferty *v.* Wheeler, 126
Lafon *v.* Chinn, 42
Lafond *v.* Deems, 67
Lahey *v.* Kingon, 445
Laird *v.* Ivens, 342
Lale *v.* Dishman, 815
Laler *v.* Jordan, 179, 280
Lamalere *v.* Caze, 847, 929, 941, 942
Lamar *v.* Russel, 168
Lamb *v.* Durant, 162, 227
v. Grover, 18
v. Salters, 359
v. Singleton, 341
Lambden *v.* Sharp, 202, 206
Lamkin *v.* Phillips, 196, 564

Page

La Mont *v.* Fullam, 29
Landolfo *v.* Appleton, 405
Lancaster Bank *v.* Myerley, 565, 566
Lane, *re*, 1185
v. Arnold, 125, 1040
v. Carpenter, 515, 516
v. Roche, 917
v. Tyler, 561, 929
Lang *v.* Fiske, 175
v. Oppenheim, 943
v. Waring, 181, 259, 566, 568
Langan *v.* Hewett, 211, 264
Lange *v.* Kennedy, 356
Langford *v.* Patton, 432
Lanier *v.* McCabe, 266
v. The Mayor, 143
Lannon *v.* Clavin, 841, 857
Lansing *v.* Gaine, 259, 266, 355, 356, 369
Lararus *v.* Long, 174
Larkins *v.* Rhodes, 102
Lash *v.* Arnold, 151, 433
Lastrapes *v.* Blanc, 1059
Lathrop *v.* Atwood, 758
Lauffer *v.* Cavett, 560
Laughlin *v.* Lorenz, 1033
Laverty *v.* Burr, 181, 258
Law *v.* Ford, 905
Lawrence *v.* Clark, 939
v. Dale, 169
v. Kinsting, 280
v. Taylor, 219, 229
v. Trustees, 1011
Layton *v.* Hastings, 206, 208
Lea *v.* Guice, 28, 172, 697
Leabo *v.* Goode, 405
Leach *v.* Leach, 687
v. Milburn Wagon Co., 1017
Leaf's appeal, 569
Leather Bank *v.* Herz, 367
Leavitt *v.* Peck, 263
Ledden *v.* Colby, 490
Lee *v.* Bullard, 44, 615
v. Craig, 663
v. Dolan, 1005
v. Lashbrooke, 644, 665, 667
v. Onstott, 206
Lefavour *v.* Yandes, 173
LeFavre *v.* Cassagnio, 19
Lefevre's appeal, 562
Lefever *v.* Underwood, 660, 922
Leffler *v.* Rice, 191
Leftwich *v.* Clinton, 124
Leftwitch *v.* Leftwitch, 1004

Page

Leggett *v.* Hyde, 25
Leland, *re*, 1177
Lemitte *v.* Starr, 258
Lemon *v.* Fox, 297
Leonard *v.* Leonard, 918
v. Wildes, 361
v. Winslow, 269
Le Page *v.* McCrae, 939
Le Roy *v.* Johnson, 145 163, 350
v. Mathewson, 82
Lessiter *v.* Jackman, 645
Lester *v.* Pollock, 572
Lesure *v.* Norris, 498
Letzer *v.* Beale, 63
Levally *v.* Ellis, 433
Levi *v.* Karrick, 644, 714
v. Lutham, 188
Levine *v.* Michel, 795, 893
Levy *v.* Bush, 102
v. Cowan, 610
v. Ley, 905
v. McDowell, 104
Lewis, *ex parte*, 1054
v. Allen, 174
v. Conrad, 1016
v. Langdon, 586
v. Moffet, 644
v. Post, 110, 111
Liadert *v.* Adams, 977
Liagre *v.* Peacock, 336, 855, 962
Lilly *v.* Kroesen, 991
Lime Rock Bank *v.* Phetteplace, 565
Limelock, &c. Ins. Co. *v.* Treat, 265
Lindell *v.* Lee, 934
Lindley *v.* Davis, 563
Lindmeir *v.* Monahan, 370
Lindsey *v.* Edmiston, 28
Linford *v.* Linford, 1019
Lintner *v.* Millikin, 25
Linton *v.* Hurley, 231, 476
Littell *v.* Fitch, 179
Little *v.* Clark, 366
v. Hamilton, 285
v. Hazard, 206
v. Snedcor, 565
v. Stanton, 849, 683
Liverpool, &c. Nav. Co. *v.* Agar, 467
Livingston v. Cox, 155, 163
v. Harvey, 432, 433
v. Hastie, 259, 266
v. Lynch, 163, 535
v. Pittsburgh, &c. R. R. Co., 169

Page

Livingston *v.* Roosevelt, 169, 259, 266, 268,270, 274
Lloyd, *re*, 1172, 1177
Lloyd *v.* Carrier, 666, 667
Locke *v.* Lewis, 275, 574
v. Stearns, 234
Lockhart *v.* Hanell, 774
Lockridge v. Wilson, 106
Lockwood *v.* Beckwith, 515, 516
v. Comstock, 356
v. Mitchell, 586, 824
Lockyer *v.* Savage, 733
Lodge *v.* Dicas, 403
Lodiker *v.* Applegate, 20
Loeb *v.* Pierpoint, 177
Loeschigk *v.* Hatfield, 1000
Logan *v.* Bond, 245
Logie *v.* Black, 20
London, &c., Society *v.* Hagerstown, &c. Bank, 162
Long *v.* Carter, 169
v. Majestre, 821
v. Story, 356
Loomis *v.* Barker, 233
v. Marshall, 19
v. Pierson, 356, 359, 444
Lord *v.* Baldwin, 472, 1019
v. Parker, 97
v. Proctor, 26
Lothrop *v.* Adams, 234
Love *v.* VanEvery, 532
Lovejoy *v.* Bowers, 228
v. Spafford, 342, 370
Lovney *v.* Gilenwaters, 660
Lowe *v.* Penny, 366
Lowenstein, Matter of, 185, 447
Lower *v.* Denton, 942
Lowery *v.* Drew, 205, 206
Lowry *v.* Brooks, 18
v. Cobb, 515, 521
Lucas *v.* Atwood, 1016
v. Bank of Darien, 171, 369
v. Cole, 33
v. Coulter, 331
v. Sanders, 206
Luce *v.* Hartshorn, 686
Ludington *v.* Bell, 391
v. Taft, 819
Ludlow *v.* Cooper, 30, 566, 567, 785, 1007
Lumbermen's Bank *v.* Pratt, 357
Lunt *v.* Lunt, 125
v. Stevens, 196, 391
Lusk *v.* Smith, 356
Lyman *v.* Lyman, 65, 644, 648, 910

	Page
Lynch *v.* Bitting,	849
v. Thompson,	16
Lyndon *v.* Gorham,	506, 609
Lyon *v.* Johnson,	368, 388
Mabbett *v.* White,	216
Machinists' Bank *v.* Krum,	468
Mackay *v.* Bloodgood,	206
Mackey *v.* Auer,	929
Mackintosh *v.* Tatman,	757
Maclin *v.* Crotcher,	300
Macon Bank *v.* Ells,	363
Macy *v.* Combs,	12
v. DeWolf,	72
McAdam *v.* Hayes,	981, 983
McAllister *v.* Montgomery,	568
McArthur *v.* Ladd,	15
McBain *v.* Austin,	227
M'Bride *v.* Hagan,	203
McCabe *v.* Franks,	884
McCall *v.* Moschovwitz,	747
v. Moss,	398
v. Oliver,	929
McCament *v.* Gray,	818
McCandless *v.* Hadden,	487
McCart *v.* Lewis,	206
McCarthy *v.* Fitts,	482
v. Nash,	55
M'Carty *v.* Emlen,	506
McCaskey *v.* Pollock,	58
McChesney *v.* Kipp,	933
M'Clelland *v.* Lindsay,	112
McClelland *v.* Remsen,	162
McCollough *v.* Judd,	468
v. Sommerville,	216
McCoon *v.* Galbraith,	373
McCormick's appeal,	563, 860, 1018
McCormick *v.* McCormick,	600, 670
McCorrin *v.* Cubbinson,	348
McCotter *v.* McCotter,	462
M'Coy *v.* Lightner,	450
McCrae *v.* Robeson,	659
McCrary *v.* Slaughter,	16, 188, 281
McCulloch *v.* Judd,	467
McCullough *v.* Sommerville,	282
McDonald *v.* Beach,	1019
v. Eggleston,	203, 207
v. Matney,	13
v. Parker.	287
McDonnell *v.* Battle House Co.,	23
McDougal *v.* Banks,	564
McDuffie *v.* Bartlett,	103, 1025
McElroy *v.* Ludlam,	174
v. Melear,	348
McElvey *v.* Lewis,	157
McEncroe *v.* Decker,	887
McFadgen *v.* Harrington,	172
M'Farland *v.* Lewis,	117
McGann *v.* Hanlin,	138
McGehee *v.* Dougherty,	929
McGill *v.* Dowdle,	14
v. McGill,	337, 1014
McGlensey *v.* Cox,	621, 721
McGowan Bros. Pump and Machine Co. *v.* McGowan,	746
v. Sprague,	604, 806
McGrath *v.* Sinclair,	568
McGregor *v.* Bainbridge,	103
v. Cleveland,	145, 189, 436
v. Ellis,	604
McGrew *v.* Walker,	103
McGuire *v.* Blanton,	211
v. O'Hallaran,	106
v. Ramsey,	565, 778, 790
McIlvaine *v.* Armfield,	69
McKee *v.* Griffin,	562
McKenzie *v.* Dickinson,	515
McKeown *v.* Guild,	842, 845
McKinney *v.* Brights,	269
v. Peck,	467
v. Smith,	220
McKowen *v.* McGuire,	586, 999
McKnight *v.* McCutchen,	942
M'Lain *v.* Carson,	485
McLanahan *v.* Ellery,	753
McLaughlin *v.* Simpson,	818
McLean *v.* Eastman,	1105
v. Ihmsen,	1059, 1084
v. Johnson,	1059
v. Meline,	1059
McLellan *v.* Pennell,	172
McMahon *v.* McCleman,	516
v. Shorenton,	780
McMichael *v.* Raoul,	855, 884, 1005
McMullen *v.* McKenzie,	110
McNair *v.* Platt,	196, 199
v. Rayland,	659, 843
v. Rewey,	522
McNally *v.* Kerswell,	485, 584
McNamara *v.* Draft,	107, 120
McNeill *v.* Reynolds,	120, 219
McNeish *v.* Hulless Oat Co.,	995
McNutt *v.* King,	968
v. Strayhorn,	507
McPherson *v.* Pemberton,	135
v. Rathbone,	117
McQuewans *v.* Hamlin,	211
McRae *v.* McKenzie,	659, 856, 945
McSherry *v.* Brooks,	930
McWhorter *v.* Mahan,	229

Page

McWilliams Manuf. Co. *v.* Blundell, 551
Maddock *v.* Astbury, 729
Magill *v.* Merrie, 159, 179, 345
Maginnis *v.* Crosby, 652
Magorem *v.* Robertson, 83
Maier *v.* Canavan, 397
Major *v.* Hawkes, 196
Maltby *v.* Northwestern, &c. R. R. Co. 280
Manhattan Co. *v.* Ledyard, 181
Manhattan Manf. Co. *v.* Sears 109
Mann *v.* Etna Ins. Co., 206
v. Flannigan, 644
v. Higgins, 500
v. Locke, 355
Manning, *re*, 1072
v. Gasharie, 6, 308
v. Hayes, 181
Manufacturer's, &c. Bank *v.* Gire, 161, 234, 243
v. Winship, 293
Manville *v.* Parks, 189
Maples *v.* Geller, 488
Marble *v.* Lypes, 56
Mardis *v.* Shackleford, 156
Maret *v.* Wood, 467
Marine Co. *v.* Carver, 219
Markham *v.* Hazen, 331
Markman *v.* Buckingham, 433
Marks *v.* Hill, 573
v. Sigler, 112
v. Stein, 14
Marlett *v.* Scantland, 999
v. Jackman, 994, 995
Marquand *v.* New York Manufactoring Co., 622, 979
Marsh's appeal, 647
Marsh *v.* Bennett, 756
v. Gold, 211
v. Northwestern Ins. Co., 66
v. Russell, 124, 717
v. Thompson, 259
v. Thompson National Bank, 179, 219
Marshall *v.* Colman, 703, 977
v. Hull, 150, 432
v. Johnson, 530, 890
Marston *v.* Dewbarry, 607, 610
Martin *v.* Blanchin, 899
v. Davis, 420
v. Ehrenfels, 107
v. Fewell, 6
v. Johnson, 145
v. Kaffroth, 226

Page

Martin *v.* Kelly, 151, 434
v. Kirk, 358
v. Searles, 345
v. Smith, 790
v. Solomons, 929
v. Thrasher, 175
v. Van Schaack, 746, 905
v. Walter, 369
v. Walton, 255, 369
Marvin *v.* Buchanan, 288
v. Dutcher, 110
Marwick, *ex parte*, 1179
Marwick, Matter of, 491
Marye *v.* Jones, 951
Mason *v.* Connell, 472, 621
v. Dennison, 469
v. Eldred, 420, 449
v. Hackett, 19
v. Tipton, 922
v. Wickersham, 405
Mass *v.* Messick, 227
Massey *v.* Pike, 206
Master *v.* Kirton, 978
Mathers *v.* Patterson, 542
Matherson *v.* Wilkinson, 487
Mathewson *v.* Allen, 513
v. Clarke, 777
Matlack *v.* James, 565, 1016
Matlock *v.* Matlock, 566
Matot, *re*, 1057, 1067
Matteson *v.* Nathanson, 994
Matthews *v.* Colburn, 934
Mauck *v.* Mauck, 566
Maude *v.* Rodes, 776, 800
Maudlin *v.* Branch Bank, 182, 210, 265, 342, 368, 369
Mauney *v.* Coit, 358
Maupin *v.* Daniel, 884
Maxey *v.* Averill, 1011
v. Strong, 348
Maxwell *v.* Evans, 1203
May, *re*, 1156
Mayberry *v.* Barniton, 210
Mayer *v.* Clark, 505, 574
Maynard *v.* Fellows, 299
Mayor *v.* Hawkes, 353
Mayrant *v.* Marston, 24
Meachem *v.* Batchelder, 180
Mead *v.* Bank of Fayetteville, 1195
v. Shepherd, 222
Meader *v.* Hughes, 318, 332
v. Malcolm, 266
Meaghan, Matter of, 733
Meaher *v.* Cox, 736
Mechanics' Bank, &c. *v.* Foster, 268

Page
Mechanics' Bank *v.* Livingston, 188, 367
Mechanics' & Farmers' Bank *v.* Dakin, 148, 195
Mechanics' & Traders' Ins. Co. *v.* Richardson, 266
Mecutchen *v.* Kennady, 272
Meehan *v.* Valentine, 18, 26
Meggett *v.* Finney, 355
Melick, *ex parte*, 1071
Mellinger *v.* Parsons, 351
Melvin, *re*, 1203
Menagt *v.* Whitwell, 609, 1024, 1026
Mercantile Bank *v.* Cox, 293
Mercer *v.* Sayre, 355
Merchant *v.* Belding, 169
Mergansteen *v.* Thrift, 606
Meridan Nat. Bank *v.* Brant, 602
Merrick *v.* Brainard, 621
Merrill *v.* Bartlett, 72
v. Green, 757, 934
v. Rinker, 506, 609
Merrit *v.* Pollys, 341, 346
Merriwether *v.* Hardeman, 686, 851, 940, 942
Mervin *v.* Playford, 20
Meserve *v.* Andrews, 17, 19, 675
Messer *v.* Messer, 568
Metcalf *v.* Fouts, 753, 883
v. Officer, 27, 106, 1079
v. Redman, 33
Metting *v.* Colt, 19
Meyberg *v.* Steagall, 607
Meyer *v.* Atkins, 348
v. Kohn, 22
Meyers *v.* Bennett, 886
Mick *v.* Howard, 110, 260
Mickle *v.* Peet, 942
Miech *v.* Allen, 1018
Mifflin *v.* Smith, 158, 285
Miles *v.* VonDeyn, 468
v. Wann, 58
Millar *v.* Craig, 665
Millard *v.* Ramsdell, 1004
Millaudon *v.* Sylvestre, 665
Miller, *ex parte*, 13, 1172
v. Andres, 932
v. Bartlett, 20
v. Brigham, 625, 981
v. Cappel, 485
v. Chandler, 19
v. Dow, 201
v. Estill, 604
v. His Creditors, 1018
Page
Miller *v.* Hines, 179
v. Hughes, 179
v. Jones, 820, 999
v. Keys, 1055, 1061
v. Lord, 669, 714
v. Manice, 265
v. Miller, 1026
v. Northern Bank, 309, 474
v. Price, 22, 194, 461, 574
v. Sims, 736
v. Sullivan, 216
Millerd *v.* Thorn, 399
Milliken *v.* Loring, 353
Mills *v.* Barber, 162, 184
v. Fellows, 644, 839
Milne *v.* Douglass, 489
Miner *v.* Downer, 291
v. Pierce, 614
Miner's Iron Works *v.* Davidson, 449
Minor *v.* Gaw, 269
Mitchell, *ex parte*, 1054
v. Dale, 471
v. Darmond, 318
v. Dobson, 396
v. O'Neale, 82
v. Read, 739
v. Rich, 358, 446
v. Wells, 933
v. Winslow, 1083
Mitchum *v.* Bank of Ky., 343
Mittnight *v.* Smith, 1020
Moale *v.* Hollins, 420
Moderwell *v.* Mullison, 566, 567
Modisett *v.* Lindley, 207
Moffat *v.* Thomson, 1001
Moister's appeal, 229
Moline, &c. Manuf. Co. *v.* Webster, 1016
Moline Wagon Co. *v.* Rummell, 269, 352
Monroe *v.* Ezzell, 459
v. Hamilton, 981
Montague *v.* Reakert, 348
Montanye *v.* Hatch, 885, 886
Montgomery *v.* Boon, 206, 207
Montjoys *v.* Holden, 922
Moody *v.* Payne, 894
Moon *v.* Story, 542, 669
Moore's appeal, 104, 489
Moore *v.* Bare, 594
v. Brink, 6
v. Burns, 433
v. Gano, 946
v. Huntington, 775
v. Lackman, 348

	Page
Moore *v.* Smith,	29
v. Thieber,	675
v. Walton,	45
Moorehead *v.* Gilmore,	181
Moran *v.* LeBlanc,	927, 931
v. Prather,	211
Mords *v.* Gleason,	625
Moreau *v.* Edwards,	227
Moreau *v.* Saffarans,	518
Morehead *v.* Wriston,	333
Mores *v.* Soc. for Destitute Children,	480
Morgan *v.* Olney,	566
v. Richarson,	358, 446
v. Roberts,	372
v. Skidmore,	1020
v. Stearns,	20
v. Watmough,	615
Moriarty *v.* Baily,	272
Morin *v.* Matin,	939
Moritz *v.* Peebles,	924
v. Phelps,	516
Morrill *v.* Spurr,	31
Morris *v.* Allen,	666, 667
v. Hillery,	437
v. Jones,	202, 207
v. Morris,	652, 1019
v. Neel,	632
Morrison *v.* Cole,	23
v. Krutz,	1016
v. Perry,	356
v. Smith,	658
v. Stockwell,	933
Morrow *v.* Riley,	931
Morse, *re*,	1178
v. Bellows,	206, 207, 209
v. Hagenah,	191
v. Hall,	124, 586
Morton *v.* Ostrom,	560
Mosely *v.* Garrett,	625
Mosgrove *v.* Golden,	461
Moss *v.* McCall,	665
v. Riddle,	163
Mosseau *v.* Thebens,	325
Mourain *v.* Delamre,	667
Mowatt *v.* Howland,	348, 368, 370
Mowbray *v.* Lawrence,	894
Moyes *v.* Brumeaux,	113
Mudd *v.* Bast,	994
Muir *v.* Leitch,	1016
Mullamy *v.* Keenan,	927
Mullendore *v.* Scott,	759
Mumford *v.* Murray,	393, 654
Munroe *v.* Cooper,	266, 268
Murdock, *ex parte*,	1202
Murdock *v.* Martin,	930
v. Mehlhop,	626, 720
Murphy, Matter of	733
Murphy *v.* Camden,	194
v. Crafts,	661
Murray *v.* Bogert,	621, 942
v. Fox,	392, 413
v. Johnson,	32, 712
v. Mumford,	999
Murrell *v.* Murrell,	210, 530
Murrill *v.* Neil,	1016
Musier *v.* Trumpbour,	30
Mutual Bank *v.* Richardson,	266
Myatts *v.* Bell,	357
Myer *v.* Krohn,	371
Myers *v.* Huggins,	361
v. Moulton,	228
Mygatt *v.* McClure,	360
Mynderse *v.* Snook,	463
Myrick *v.* Dame,	925
Naglee *v.* Minturn,	951
Nall *v.* McIntyre,	269
Napier *v.* Catron,	202, 203, 207
v. M'Leod,	359
National Bank *v.* Norton,	356, 369
v. Sackett,	177
v. Thomas,	287
Nat. Bank of Commonweath *v.* Law,	264
National Bank of Jacksonville *v.* Mapes,	194
Nat. Exchange Bank *v.* White,	188, 288
National Union Bank *v.* London,	6, 179, 280
Nave *v.* Sturges,	707
Neal *v.* Hassan,	354, 426
Neil *v.* Greenleaf,	924
Nelson, *ex parte*,	469
Nelson *v.* Connor,	616
v. Hayner,	519
v. Hill,	488, 1011
v. Lloyd,	116, 470
Newbiggin *v.* Pillans,	97
Newbran *v.* Snieder,	25
Newcomet *v.* Brontzman,	341
Newell *v.* Humphrey,	546, 918
v. Smith,	179
Newland *v.* Tate,	645
Newman, *ex parte*,	1202
v. Bagley,	177
v. Bean,	18
Newmarket Bank *v.* Locke,	1012
New Orleans *v.* Gauthreauz,	2

Page
New York Fire Ins. Co. *v.* Bennett, 259, 269
Niagara County Bank *v.* Lord, 552
Nichol *v.* Stewart, 603
Nicholaus *v.* Thielges, 20
Nichols *v.* Chesirs, 280
v. Hughes, 167
v. Ogden, 566
v. Prince, 759
v. Sober, 275
v. White, 118
Nicholson *v.* Janeway, 851
v. Moog, 364
Nickels *v.* Mooring, 353
Nicoll *v.* Mumford, 1016
Niday *v.* Harvey, 419
Nichoff *v.* Dudley, 12
Niles *v.* Williams, 814
Nimis, *re*, 1172, 1176, 1177
v. Bigelow, 292
Nims *v.* Nims, 855
Nixdorf *v.* Smith, 394, 479
Nixon *v.* Downey, 172
v. Nash, 607
Noble *v.* M'Clinton, 220
Noel *v.* Bowman, 661
Noonan, *re*, 1070
v. McNab, 721
v. Orton, 721
Norcross, Matter of, 967
v. Clark, 479
Norman *v.* Huddleston, 847
Norment *v.* Johnson, 196, 199
Norris *v.* Howard, 740
v. Vernon, 573
North *v.* Bloss, 473
v. Mudge, 445
North Pa. Coal Co.'s appeal, 283
North River Bank *v.* Stewart, 1016
Northrup *v.* Phillips, 784
Norton *v.* Thatcher, 285
Norway *v.* Rowe, 977
Norwent *v.* Hull, 20
Noyes *v.* New Haven, &c., R. R. Co., 199
Nugent *v.* Locke, 814
Nusstaumer *v.* Packer, 345
Nutt *v.* Hunt, 182

Oakley *v.* Aspinwall, 170
Oakey *v.* Rabb, 1016
Oates *v.* Brown, 449
O'Bannon *v.* Miller, 571
v. Simrall, 209
Ober *v.* Indianapolis R. R. Co., 354

Page
O'Bryan *v.* Gibbons, 904
Ochminger, *re*, 1067
Odiorne *v.* Maxcy, 172, 510
v. Woodman, 944
Odgeen *v.* Arnot, 339
Odgen *v.* Gillingham, 1104
Offut *v.* Scott, 998
Ogden *v.* Astor, 999, 1002
Olcott *v.* Wing, 656, 914
Oliphant *v.* Mathews, 146, 293
Oliver *v.* Gray, 80
Olleman *v.* Regan, 631, 933
Olmsted *v.* Hotailing, 226, 443
Onondaga Bank *v.* De Puy, 190, 191
Ontario Bank *v.* Hennessey, 145
Oppenheimer *v.* Clemons, 656
Oreilly *v.* Brady, 861, 1005
Ormsbee *v.* Davis, 216
Osborn *v.* McBride, 567
Osborne *v.* Barge, 215
v. Stone, 211
Osgood *v.* Glover, 213
Ostrom *v.* Jacobs, 173
Otis *v.* Sill, 525
O'Toole *v.* Garvin, 126
Ottoman Cahvey Company *v.* Dane, 149
Overton *v.* Tozer, 446
Owens *v.* Collins, 565
Owings *v.* Low, 173
v. Trotter, 300
Oxley, *ex parte*, 733
v. Willis, 358
Ozeas *v.* Tolman, 942

Pagan *v.* Sparks, 486
Page *v.* Brant, 366, 369, 471
v. Morse, 94
v. Vankirk, 767, 963
Pahlman *v.* Graves, 1018
v. Taylor, 212, 255
Pahlmian *v.* Cranes, 1019
Paige *v.* Paige, 554
Paine *v.* Moore, 928
v. Thatcher, 924
Palmer *v.* Dodge, 354
v Elliott, 300
v. Myers, 177, 182
v. Pinkham, 119
v. Scott, 241
v. Stephens, 146, 296
v. Tyler, 816
Parchen *v.* Anderson, 40
Pardee *v.* Markle, 380, 937

Page

Parish *v.* Lewis, 477, 604, 1012
Park *v.* Wooten, 345
Parker, *In re*, 405
v. Bowles, 568
v. Canfield, 19, 28, 44, 405
v. Cousins, 357
v. Gregg, 455
v. Jahnson, 475
v. Jonte, 689, 883
v. Muggridge, 1173
Parkhurst *v.* Kinsman, 72, 979
v. Muier, 861
Parkin *v.* Carruthers, 365
Parmalee *v.* Wiggenhorn, 332
Parmenter *v.* Kingsley, 760
Parsley *v.* Ramsey, 145
Partin *v.* Leitenloh, 179
Partridge *v.* Kingman, 20
Patch *v.* Wheatland, 214
Pate *v.* Bacon, 150, 151, 432, 434
v. First Nat. Bank, 255
Paterson *v.* Camden, 405
v. Silliman, 560
Paton *v.* Baker, 229
v. Wright, 183
Patten *v.* Cunningham, 449
v. Gunney, 465
v. Karaugh, 207
v. Whitehead, 454
Patterson *v.* Martin, 849
v. Silliman, 605
v. Ware, 676
Pattison *v.* Blanchard, 18
v. Norris, 349
Patton *v.* Calhoun, 649
Payne *v.* Able, 1201
v. Matthews, 1018
v. Slate, 357
Peacey *v.* Peacey, 756
Peacock *v.* Cummings, 535
v. Peacock, 953
Pearce *v.* Bruce, 485
v. Chamberlain, 984
v. Pearce, 666, 859
Pearpoint *v.* Graham, 184, 336, 951, 958
Pearson *v.* Keedy, 597, 1012
v. Post, 161
Pease, *re*, 1176
v. Cole, 188
v. Rush, 572, 991
Peck *v.* Fisher, 1022
v. Jenness, 1200
v. Schullze, 609
Pecker *v.* Hall, 356

Page

Pecot *v.* Armelin, 562
Pemberton *v.* Oakes, 382
Pendleton *v.* Wambersie, 777, 822
Penn, Matter of, 1070
v. Kearney, 213
v. Stone, 942
v. Whitehead, 94
Penniman *v.* Jones, 781
Pennrock *v.* Swayne, 946
Penny *v.* Martin, 420, 472
Peoples' Bank *v.* Shock, 607
People *v.* Croton Acqueduct Board, 145
v. Judges of Dutchess, 209
v. Till, 597
Pepper *v.* Thomas, 554
Perkins *v.* Perkins, 841
Perley *v.* Brown, 936
Perman *v.* Tunno, 1026
Perrin *v.* Keene, 354
Perrine *v.* Hankinson, 23
Perry *v.* Butt, 4, 111
v. Holloway, 580
v. Randolph, 114, 280
v. Spencer, 756
Person *v.* Carter, 206, 207
v. Nelson, 575
Peters *v.* Davis, 479
v. Horbach, 245
v. McWilliams, 334, 661
Peterson *v.* Poignard, 816
v. Roach, 304
Petit *v.* Chevelier 906
Pettee *v.* Appleton, 40, 41
v. Orser, 181, 182
Pettes *v.* Bloomer, 207
Pettengill *v.* Jones, 927
Pettis *v.* Atkins, 6
Peyton *v.* Lewis, 332
v. Stratton, 201
Pfeiffer *v.* Maltby, 138
Pfirrman *v.* Koch, 574
Phelan *v.* Hutchinson, 686
Phelps, *re*, 1081
v. Brewer, 444
Philips *v.* Bridge, 1016, 1024, 1037
Phillips *v.* Cork, 615
v. Goldtree, 126, 434
v. Lockhart, 940
v. Nash, 32, 340
v. Parington, 72, 110, 172, 174
v. Reeder, 360, 512, 828, 860
v. Turner, 644
Piatt *v.* Oliver, 203, 338, 566, 604, 631

Page

Pickels *v.* McPherson, 197
Pickerell *v.* Fisk, 2, 69
Pickney *v.* Kerney, 224
Pierce *v.* Cameron, 419
v. Covert, 914
v. Cubberly, 839, 881
v. Daniels, 662
v. Ham, 827
v. Hickenburg, 196, 199
v. Jackson, 182, 243, 461, 506, 611, 612, 1016, 1024
v. McClellan, 512
v. Pass, 196, 199, 269
v. Tiernan, 651
v. Nelson, 602
Pierson *v.* Hooker, 203, 207, 209
v. Steinmyer, 111, 123
Pike *v.* Bacon, 205
v. Douglas, 219
Pillsbury *v.* Pillsbury, 69
Pim *v.* Harris, 666
Pine *v.* Ormsbee, 157, 512
Pinkney *v.* Hall, 270
Pio Pico *v.* Cuyas, 935
Piper *v.* Smith, 568, 666
Pitcher *v.* Barrows, 342
Pitkin *v.* Pitkin, 1013
Pitt, *re*, 1072
Pitts *v.* Hall, 72
v. Waugh, 165, 515, 547
Place *v.* Sweetzer, 607, 609
Platt *v.* Halen, 462, 501
v. Platt, 836
Pleasants v. Fant, 13
Ploss *v.* Thomas, 610
Plumb, *re*, 1080
Plumer *v.* Lord, 97
Plummer *v.* Trout, 22
Plunkett *v.* Dillon, 15
Poillon *v.* Secor, 60
Polk *v.* Buchanan, 45
v. Oliver, 366, 369
Pollard *v.* Stanton, 24
Pollock *v.* Williams, 281
Pomeroy *v.* Benton, 691
v. Sigerson, 29, 42
Pond *v.* Clark, 650, 665, 667, 674
v. Cummins, 19
v. Starkweather, 304
Ponton *v.* Dunn, 700
Pool *v.* McDonald, 1205
Poole *v.* Delancy, 933
v. Gist, 236
v. Hintrager, 397
v. Lewis, 285

Page

Pope *v.* Hays 757
v. Randolph, 929
v. Risley, 355, 364, 366
v. Salsman, 818
Popper *v.* Schieder, 907
Porter *v.* Cresson, 150, 432
v. Gunnison, 265
v. Wheeler, 754
v. Wilson, 118
Portland Bank *v.* Hyde, 437
Portsmouth *v.* Donaldson, 817
Posey *v.* Bullitt, 207
Post *v.* Kimberly, 229
Postlewait *v.* Howes, 439, 1011
Pote *v.* Phillips, 941
Potter *v.* Dillon, 179
v. Greene, 58
v. McCoy, 208
v. Moset, 994
v. Price, 191
Potts *v.* Blackwell, 573, 574
Powell *v.* Graves, 851, 931, 934
v. Hopson, 337, 994
v. Maguire, 917
v. Messer, 266
v. North, 337, 994
Powers *v.* Powers, 1024
Powrie *v.* Fletcher, 497
Pratt *v.* McHatton, 123, 651, 669, 856, 858, 899, 991
v. Willard, 453, 463
Pray *v.* Morse, 512
Prentiss *v.* Foster, 180
v. Kelly, 112
v. Sinclair, 366, 369
Presser *v.* Henshaw, 331
Preston *v.* Foelinger, 370
Price *v.* Alexander, 19, 207
v. Cavins, 938
v. Hicks, 562, 565
v. Hunt, 616
v. Towset, 342, 346
v. Williams, 762
Priest *v.* Chouteau, 13
Prince *v.* Crawford, 187
Princeton, &c. Turnpike *v.* Gulick, 341, 346
Pringle *v.* Leverich, 58, 350
Printup *v.* Turner, 214
Providence *v.* Bullock, 562
Prudhomme *v.* Henry, 354
Pruyn *v.* Black, 470
Pugh *v.* Carrie, 561, 566
Purdy *v.* Lacock, 447, 1018
v. Powers, 269

Page

Pursley *v.* Ramsey, 107, 317, 367
Purviance *v.* Sutherland, 282
Purvines *v.* Champion, 929
Purvis, *ex parte*, 1081
Putnam *v.* Dobbins, 567
v. Parker, 586

Quincey *v.* White, 107
Quine *v.* Quine, 594
Quiner *v.* Marblehead, 162
Quinliran *v.* English, 889

Raborg *v.* Bank of Columbia, 491
Radcliffe *v.* Varner, 281
Rainey *v.* Nance, 1016
Ramey *v.* McBride, 229
Rammelsberg *v.* Mitchell, 565, 566, 586, 748
Ramson *v.* Pomeroy, 485
Ramsy *v.* Deas, 247
Randall *v.* Morrell, 890, 905
Randell *v.* Yates, 108
Randolph *v.* Peck, 348
Randolph Bank *v.* Armstrong, 162
Rank *v.* Grote, 567
Rankin *v.* Jones, 574
Ransom *v.* Loyless, 368
Ransom *v.* Van Deventer, 572
Ratzer *v.* Ratzer, 594
Ray *v.* Bogart, 785, 842
Raymond *v.* Caine, 856
v. Putnam, 686, 859
Read *v.* Nevitt, 722
Reber *v.* Columbus, &c. Co., 473
Reboul *v.* Chalker, 33
Redfield *v.* Middleton, 804
Redlon *v.* Churchill, 261
Reece *v.* Hoyt, 354, 512
Reed, *ex parte*, 1200
v. Girty, 420
v. Johnson, 436, 826
v. Murphy, 19
v. Shepardson, 612, 1024
v. Wessel, 513
Rees *v.* Simons, 453
Reese v. Bradford, 505, 532, 574
Reeves *v.* Ayres, 569
v. Denicke, 148
Regester *v.* Dody, 400
Reid *v.* Frazer, 344
v. Vidal, 795
Reilly *v.* Smith, 366
Reimsdyk *v.* Kane, 296
Reis *v.* Hellman, 662
Reiter *v.* Morton, 921

Page

Remick *v.* Ewing, 994
Remington *v.* Cummings, 445
Renfrow *v.* Pearce, 915
Reno *v.* Crane, 551
Renton *v.* Chaplain, 507, 616, 618, 902
Reppert *v.* Colvin, 426
Reubin *v.* Cohen, 220
Reybold *v.* Dodd, 107, 644
Reynold *v.* Austin, 970
Reynolds *v.* Cleveland, 221, 285
v. Mardis, 664, 665
v. Pool, 24
v. Toppan, 20
v. Waller, 234, 243
Rhea *v.* Vannoy, 535
Rhiner *v.* Sweet, 856
Rhodes *v.* Williams, 776, 911
Riarl *v.* Willhelm, 944
Rice *v.* Austin, 18, 20, 1016, 1024
v. Barnard, 1020
v. Barrett, 55, 58
v. Doniphan, 448
v. Richards, 486, 1006
v. Shuman, 510
Rich *v.* Davis, 179
Richards *v.* Baurman, 900, 963
v. Butler, 352, 366
v. Grinnell, 15
v. Hunt, 352
v. Todd, 804
Richardson *v.* Bank of England, 683
v. Farmer, 165
v. French, 241
v. Fuller, 446
v. Hewitt, 20
v. Lester, 214
v. Moies, 356
v. Wyatt, 690
Richmond *v.* Judy, 67
Richter *v.* Poppenhausen, 1009
v. Selin, 113
Rick *v.* Neitzy, 884
Rickey *v.* Bowns, 918
Riddle *v.* Etting, 354
Rider *v.* Gilbert, 594, 1016, 1025
Ridge *v.* Alter, 449
Ridgeley *v.* Carey, 1022
v. Dodson, 67
Ridgway's appeal, 562
Ridgeway *v.* Grant, 713, 926
Ridley *v.* Taylor, 266, 271, 273
Riggs *v.* Stewart, 941
Rimel *v.* Hayes, 273
Ring *v.* Ham, 108

	Page
Ringo *v.* Wing,	327, 331
Ripley *v.* Colby,	105
Rippey *v.* Evans,	105
Rishton *v.* Grissell,	666
Risley *v.* Pope,	366
Rizer *v.* James,	106
Roach *v.* Perry,	594, 644, 645
Roache *v.* Pendergast,	956
Robb *v.* Mudge,	348, 574
v. Stevens,	1023
Robbins *v.* Fuller,	353
v. Laswell,	158
Robert *v.* McCarty,	563
Roberts *v.* Atwood,	454
v. Johnson,	233
v. Kelsey,	817, 994
v. Law,	1000
v. McKee,	512, 870
v. Oldham,	1029
v. Ripley,	945
v. Strang,	393
v. Totten,	255, 661
Robertshaw *v.* Hanway,	488, 586
Robertson *v.* Baker,	560, 605
v. Miller,	706
v. Read,	683
Robinson *v.* Aldridge,	265
v. Crowder,	184
v. Davidson,	799
v. Gilfillan,	708, 947
v. Green,	104, 923, 942
v. Gregory,	177
v. Magarity,	146
v. Thompson,	486, 1009
Robins *v.* Warde,	112
Rochester *v.* Trotter,	163
Rockwell *v.* Wilder,	933
Roddin, *re*,	1143
Rodes *v.* Rodes,	650
Roe *v.* Galliers,	733
Roger *v.* Nichols,	979
Rogers, *ex parte*,	1059
v. Batchelor,	269, 272
v. Kichline,	459
v. Merander,	1018
v. Nichols,	70, 894
v. Ressiner,	326
v. Rogers,	437, 946
Rohr *v.* Pearson,	860, 862
Rolfe *v.* Dudley,	195
Rollins *v.* Stevens,	210
Rolston *v.* Click,	211
Roney *v.* Buckland,	192, 232
Roop *v.* Rogers,	1025
Roosvelt *v.* McDowell,	485
Root *v.* Stevenson,	943
Rootes *v.* Wellford,	360
Rose *v.* Baker,	192
v. Roberts,	759
Rosenberg *v.* Block,	105
Rosenfield *v.* Haight,	45
Ross *v.* Cornell,	729
v. Everitt,	450
v. Henderson,	560
v. Howell,	447
v. West,	926
v. Wigg,	126
Roth *v.* Colvin,	179
v. Moore,	221, 285
Rothell *v.* Grimes,	1025
Rothwell *v.* Dewees,	488, 774
Rouillier *v.* Wernicki,	97
Rowand *v.* Fraser,	565
Rowland *v.* Boozer,	935
v. Miller,	860
Rowley *v.* Stoddard,	391
Royster *v.* Johnson,	648
Ruckle, *ex parte*,	1157
Ruckman *v.* Decker,	546
Ruddick *v.* Otis,	22
Ruffin, *ex parte*,	597
Ruffner *v.* Hewitt,	353
v. McConnell,	209
Rugely *v.* Gill,	455
Ruhe *v.* Burnell,	111
Rush *v.* Thompson,	226
Russel *v.* Leland,	216
Russell, *ex parte*,	1155
v. Annable,	209
v. Byron,	818
v. Green,	199, 670
v. Grimes,	936
v. Leland,	387, 981
v. Miller,	562
v. Minnesota Outfit,	944
v. Swan,	443
Rust *v.* Chisolm,	561
v. Hauslet,	266
Rutledge *v.* Squires,	170, 266
Ryerson *v.* Hendrie,	468
Ryhiner *v.* Feickert,	147
Sage *v.* Chollar,	754
Sager *v.* Tupper,	111, 117, 309, 497
Salemon *v.* Shinner,	645
Salmon *v.* Davis,	195
Saloy *v.* Albrecht,	605, 981
Salter *v.* Ham,	12, 841
Saltmarsh *v.* Bower,	168, 190

Page

Sampson *v.* Shaw, 123, 485
Sanborn *v.* Stark, 182
Sanders *v.* Ruddle, 222
v. Ward, 197
Sanderson *v.* Milton Stage Co., 336, 953
Sandilands *v.* Marsh, 212
Sanger *v.* Overmier, 480
Sangford *v.* Mickles, 357
Sangston *v.* Hack, 19
Sankey *v.* Columbus Iron Works, 19
San José Indiano, The, 146, 529
Sanquoit Silk Manuf. Co.'s appeal, 62
Santhoff, *re*, 988
Sargent *v.* Collins, 106, 290
Sauffey *v.* Howard, 280
Saul *v.* Kruger, 443
Saunders *v.* Bartlett, 607
v. Duval, 882, 883
v. Wilder, 488
Sauntry *v.* Dunlap, 269, 626
Savage *v.* Carter, 650
v. Putman, 398, 631
Savery *v.* Thurston, 657
Saxton *v.* Lamb, 710
Sayer *v.* Bennet, 965, 970, 984
Saylor *v.* Mockbee, 897
Sayre *v.* Peck, 849
Schackelford *v.* Clark, 1012
Schackleford *v.* Schackleford, 571
Schaeffer *v.* Fithian, 1019
v. Fowler, 69
Schallenberger *v.* Seldowridge, 66
Schalter *v.* Winpenny, 343
Schatzell *v.* Bolton, 611
Schenke *v.* Dana, 648
Schermerhorn *v.* Schermerhorn, 211
Schieffelin *v.* Stevens, 366
Schields *v.* Fuller, 585
Schink, *ex parte*, 1058
Schlater *v.* Winpenny, 148
Schmidlapp *v.* Currie, 574
Schneider *v.* Sansom, 228
Schnepf, *ex parte*, 1200
Schofield, *ex parte*, 1202
Scholefield *v.* Eichelberger, 337, 994
Schoneman *v.* Fegley, 360
Schuchardt, *In re*, 251
Schurten *v.* Davis, 342
Schwabacker *v.* Riddle, 232, 251, 277
Schwindler *v.* Euell, 394
Scott *v.* Bandy, 167
v. Blood, 106
v. Bogart, 448
v. Bryan, 652
v. Bufforn, 1000

Page

Scott *v.* Campbell, 14, 932
v. Colmesnil, 345, 420
v. Lalor, 826
v. McKinney, 547
v. Pinkerton, 856
v. Scott, 774
v. Searles, 823
v. Shepard, 224
v. Shipherd, 356
v. Trent, 195
v. Tupper, 1000
Scovill *v.* Kinsley, 627
Scroggs *v.* Cunningham, 668
Scruggs *v.* Blair, 566, 567
v. Russell, 102, 515
Scudder *v.* Delashmut, 1026
Scull's appeal, 62
Seaman *v.* Johnson, 928
v. Waddington, 982
Seawell *v.* Payne, 214, 813
Secor *v.* Keller, 459
Sedan *v.* Williams, 419, 604, 756
Seekell *v.* Fletcher, 105
Seeley *v.* Schenck, 150, 432
Seegel *v.* Chidsey, 304
Seighortner *v.* Weissenborn, 942, 964
Seiler *v.* Brenner, 563
Seitz *v.* Buffum, 434
Selden *v.* Bank of Commerce, 169, 210
Seldner *v.* Mount Jackson Nat. Bank, 182
Sellers *v.* Streator, 497
Sells *v.* Hubbell, 631
Sewell *v.* Humphrey, 817
Sexton *v.* Sexton, 520
Seymour, *ex parte*, 1200
Shaaber *v.* Bushong, 211
Shackleford *v.* Shackleford, 883
v. Smith, 55
Shad *v.* Fuller, 895
Shafer *v.* Randolph, 55
Shaffer *v.* Snyder, 342
Schalck *v.* Harmon, 580
Shalter *v.* Caldwell, 943
Shamburg *v.* Ruggles, 366
Shanahan, *re*, 1108
Shannon *v.* Wright, 887
Shapard *v.* Lightfoot, 448
Sharp *v.* Hibbirs, 255
Sharpe *v.* Johnson, 158
Shattuck *v.* Lawson, 939
Shaw *v.* Knowles 1012
v. McDonald, 270
v. Pratt, 391

	Page
Shearer *v.* Shearer,	914, 999
Shearman *v.* Hart,	739
Shedd *v.* Bank,	445
v. Wilson,	1018
Sheiffer, *ex parte*,	1081
Sheldon *v.* Smith,	177
Shelly *v.* Hiatt,	648
Shelton *v.* Cocke,	355
Shenk's appeal,	396
Shepard, *ex parte*,	1084, 1091
Shepard, Matter of,	1071
v. Pratt,	19
v. Ward,	196, 455
Shepherd, Matter of,	981
v. Boggs,	747, 817
v. Frys,	453
Sherriff *v.* Wilks,	211
Sherman *v.* Kelton,	117
Sherwood *v.* Marwick,	243
v. Snow,	299
v. St. Paul, &c. R. R. Co.,	561
Shiddell *v.* Messick,	676
Shields *v.* Fuller,	1001
Shipley *v.* Kenton,	229
Shipwith *v.* Lea,	586
Shirley *v.* Fearne,	206
Shirreff *v.* Wilks,	270, 273
Shoemaker Piano Co. *v.* Bernard,	333, 883
Shorter *v.* Highlower,	332
Shotwell *v.* Miller,	390
Shouse, *ex parte*,	1064
Shropshire *v.* Russell,	522, 580
v. Shepperd,	19
Shufeldt *v.* Seymour,	467
Shulte *v.* Hoffman,	905
Shurlds *v.* Tilson,	369
Shutts *v.* Chaffee,	436
Skannel *v.* Taylor,	366, 405
Skinner *v.* Bedell,	583
v. Dayton,	7, 716
v. Tinker,	157
Skipp *v.* Harwood,	612, 614
Skipwith *v.* Lea,	999
Sibley *v.* Young,	284
Siegel *v.* Chisdey,	339, 966
Siegfried *v.* Ludwig,	358
Sigler *v.* Knox Co. Bank,	574
Sigourney *v.* Munn,	565, 912
Sigsby *v.* Willis,	1070
Sikes *v.* Work,	68, 931
Silvers *v.* Foster,	469
Silverthorn *v.* Brands,	654
Simmons *v.* Curtis,	339, 981
Simonds *v.* Strong,	345
Simonton *v.* Poucher,	355
Simonton *v.* McLain,	822
Simpson *v.* Seltz,	665
v. Geddes,	452
v. Leech,	581
v. Schulte,	474
Simrall *v.* O'Bannons,	650
Sims *v.* Brutton,	243
v. Smith,	199, 264, 360
Simson *v.* Ingham,	383
Sinclair *v.* Wood,	106
Sindh *v.* Crowley,	191
Sinklen *v.* Lambert,	222
Sitler *v.* Walker,	607, 617
Slade *v.* Paschal,	25, 118
Slatter *v.* Caroll,	1011
Slee *v.* Bloom,	163
Sleech's Case, in Devaynes *v.* Noble,	404
Slemmer's appeal,	567
Sloan *v.* Moore,	183, 886
Slocum *v.* Hooker,	469
Sloo *v.* State Bank,	446
Smith *v.* Andrews,	27
v. Babcock,	1200
v. Baker,	1016, 1024
v. Black,	420, 447
v. Blatchford,	434
v. Bodine,	20
v. Bryson,	775
v. Canfield,	150, 432
v. Collins,	188, 190
v. Cooper,	744
v. Crooker,	464
v. Danvers,	576
v. Davis,	453
v. Edwards,	604
v. Gregg,	434
v. Griffith,	106
v. Hall,	218
v. Hill,	168, 509
v. Hoffman,	287
v. Hollister,	104
v. Hunt,	453
v. Jackman,	369
v. Jackson,	369, 554, 566
v. Kerr,	205, 206
v. Loring,	659
v. Lowe,	899, 903
v. Ludlow,	426
v. Lusher,	260
v. Mallory,	1016
v. Mulock,	157, 953
v. Perry,	19
v. Peters,	409
v. Ramsey,	516

Page

Smith *v.* Reddell, 925
v. Riddle, 713
v. Sheldon, 348
v. Sloan, 187
v. Smith, 809, 926, 942
v. Stone, 209
v. Summerlin, 15
v. Tarleton, 102, 108, 565, 693
v. Vanderburg, 342, 724
v. Wilson, 78
v. Wright, 14
Smyth *v.* Harvie, 156, 236, 372
v. Strader, 269
Snead *v.* Barringer, 287
Sneed *v.* Kelly, 171
Snell *v.* Atlantic, &c. Co 285
v. Crowe, 614
v. DeLand, 15, 66
Sniffer *v.* Lass, 1016
Snodgrass's appeal, 1026
v. Broadwell, 106, 436
Snow *v.* Howard, 474
Snyder *v.* Burnham, 15
v. May, 202, 207
Solom *v.* Kirkwood, 369
Soloman, *ex parte*, 1202
Solomon *v.* Fitzgerald, 1C01
v. Solomon, 4, 123, 276, 515
Soule *v.* Hayward, 14
Southard *v.* Lewis, 488
v. Steele, 175
Southern *v.* Grim, 342
Southern White Lead Co. *v.* Haas, 33
South Fork Canal *v.* Gerdon, 225
Southmayd's appeal, 514
Southwick *v.* Allen, 957
v. McGovern, 342
Spann *v.* Fox, 842, 1003
v. Nance, 748, 895
Spearman *v.* Keim, 94
Speake *v.* Barrett, 343
v. Prewitt, 459
v. White, 355
Spear *v.* Crawford, 110
v. Newell, 817
Spears *v.* Toland, 37, 342
Speer *v.* Bishop, 352
Sprague *v.* Ainsworth, 180
Springer *v.* Cabell, 942
v. Shirley, 405
Sproat *v.* Porter, 67
Spront *v.* Crowley, 924
Spurck *v.* Leonard, 212
Staats *v.* Bristow, 581

Page

Staats *v.* Howlett, 748
Stafford *v.* Fargo, 542, 934
v. Gold, 584, 946
Stage *v.* Gorich, 886
Stainer *v.* Tysen, 265
Stalhert *v.* Knox, 941
Stall *v.* Catskill Bank, 182
Stanhope *v.* Seeplee, 1001
Stannard *v.* Smith, 287
Stanton *v.* Lewis, 990
Stanwood *v.* Owen, 1033
Stapleton *v.* King, 15
Stark *v.* Corey, 192
v. Noble, 740
Starke *v.* Kenan, 479
Starr *v.* Case, 709, 999
Star Wagon Co. *v.* Sweeze, 363
State *v.* Baldwin, 847, 881
v. Brown, 394
v. Donnelly, 20
v. Quick, 979
v. Thomas, 574
v. Wiggin, 111
State, &c. Bank *v.* Thompson, 181
Stead *v.* Salt, 176
Stearns *v.* Burnham, 349
Stebbins *v.* Harmon, 835
Steel *v.* Jennings, 190, 191
Stegall *v.* Coney, 167, 228, 258
Stein *v.* La Dow, 177
v. Robertson, 94, 594 838
Steinhart *v.* Fyhrie, 269
Stenburh *v.* Callanan, 332, 480
Stephens *v.* Orman, 512, 850
Stephenson *v.* Cornell, 55
Sterne *v.* Goep, 363
Stettheimer *v.* Stettheimer, 470
Stevens, *re*, 1057
v. Baker, 943
v. Bank of Central New York, 446, 1024
v. Faucet, 12, 233
v. Lunt, 455
v. Rollins, 490
v. Yeatman, 686, 858, 986
Stevenson *v.* Jackson, 1193
v. Mathers, 820
Stewart *v.* Burkholter, 817
v. Caldwell, 304
v. Rogers, 395
v. Ruggles, 366
v. Slater, 573
v. Sonneborn, 366, 368
Stidger *v.* Reynolds, 659, 716
Stiernermann *v.* Cowing, 360

Page
Stiles *v.* Meyer, 321
Stillwell *v.* Gray, 282
Stimpson *v.* Green, 21
Stimson *v.* Lewis, 720, 956
Stitt *v.* Cass, 392, 756
St. John *v.* Holmes, 446
St. Louis Type Foundry Co. *v.* Wisdon, 384
St. Nicholas Nat. Bank *v.* Savery, 257
Stoallings *v.* Baker, 29
Stockdale *v.* Ullery, 890
Stockton *v.* Frey, 231
Stockwell *v.* Dillingham, 251
v. United States, 232
Stoddard *v.* Wood, 934
Stoddart *v.* Key, 126
Stokes *v.* Stevens, 229, 506
Stone *v.* Chamberlain, 399
v. Fouse, 924, 942
Stever *v.* Hinkley, 161, 179, 413, 815, 1012
Story *v.* Moon, 905
v. Barrell, 174
Stoughton *v.* Lynch, 515, 522, 565, 632, 669, 670, 715
Stout *v.* Fortner, 776, 887
v. Seabrook, 842
v. Zulick, 7
Stoutenburgh *v.* Vandenburugh, 447
Stowers, *re*, 1070
Strange *v.* Graham, 586
Strangford *v.* Green, 176
Strauss *v.* Waldo, 467
Strecher *v.* Iron, 347
Street *v.* Rigby, 761
Straffin *v.* Newell, 209
Stroman *v.* Varn, 214
Strong *v.* Baker, 883
v. Clawson, 814
v. Fish, 201
v. Hines, 450
v. Niles, 308
v. Place, 33
Studwell *v.* Shapter, 94
Stumpt *v.* Boaur, 545
Sturges *v.* Swift, 933
Succession of Arick, 223
Succession of Beer, 1017
Succession of Harris, 657
Succession of Powell, 944
Sullivan *v.* Smith, 177
Summay *v.* Patton, 568
Surtell *v.* Brailsford, 97
Sutton *v.* Dillaye, 355
v. Irwine, 210

Page
Sutton *v.* Mandeville, 883
Swails *v.* Coverdill, 461, 532
Swallow, The, 7, 15
Swan *v.* Stedman, 205, 206
Swann *v.* Sanborn, 45, 60
Sweeney *v.* Neeley, 861
v. Stanford, 432
Sweet *v.* Bradley, 226
v. Morrison, 509
v. Taylor, 943
Sweetser *v.* French, 210
Swift *v.* Dean, 520
Switzer *v.* Smith, 1017
Swords *v.* Owen, 125
Sylverstein *v.* Atkinson, 149, 280
Sylvester *v.* Smith, 222, 443, 459

Tabb *v.* Gist, 110, 254, 342, 621
Taft *v.* Buffum, 979
v. Schwamb, 559
Taggart *v.* Phelps, 345
Tait *v.* Murphy, 608
Tallmadge *v.* Penoyer, 245
Tams *v.* Hitner, 55
Tanner *v.* Hall, 259
Tapley *v.* Butterfield, 214, 216, 282
Tappan *v.* Blaisdell, 506, 609, 1025
Tapping *v.* Paddock, 665
Tarleton *v.* Herbert, 432
Tassey *v.* Church, 173, 438
Tay *v.* Ladd, 276
Tayloe *v.* Bush, 23
Taylor *v.* Bass, 497
v. Bennis, 910
v. Bothin, 990
v. Castle, 994
v. Cawthorne, 662, 975
v. Coffing, 708
v. Coryell, 176
v. Fields, 612, 613
v. Hancock, 318
v. Henderson, 470
v. Herring, 883
v. Hill, 348
v. Hillyer, 265, 355
v. Hutchinson, 866
v. Jones, 232
v. Penny, 31, 621
v. Smith, 942, 944
v. Sotolingo, 19
v. Taylor, 222, 344, 585, 708
v. Young, 343, 666, 668
Tebbetts, *ex parte*, 1200
v. Dearborn, 522
Teller *v.* Muir, 468

	Page
Teller *v.* Patten,	117
v. Wetherell,	487, 584
Temple, *re*,	1070, 1079
v. Seaver,	357
Tenney *v.* Foote,	234
v. Johson,	573
v. Simpson,	517, 821
Terry *v.* Butler,	1016
v. Carter,	920
Terrell *v.* Goddard,	904
Terrill *v.* Richards,	103
Thayer *v.* Augustine,	23
v. Barney,	518
v. Lane,	567
v. Smith,	300
Theall *v.* Lacey,	689
Third Bank *v.* Snyder,	188
Thomas, *In re*,	299
v. Lusk,	616
v. Miles,	740
v. Moore,	119, 120
v. Pennich,	199
v. Stetson,	269
v. Wolcott,	117
Thompson's Estate,	169
Thompson *v.* Egbert,	561
v. First Nat. Bank,	56
v. Faist,	617
v. Hale,	269
v. Howard,	168, 474
v. Lewis,	610
v. Lowe,	817
v. Mylne,	694
v. Percival,	404
v. Steamboat Morton,	945
v. Walker,	847
Thomson *v.* Thomson,	775
Thorn *v.* Smith,	172
Thorndike *v.* De Wolf,	72
Thorne *v.* Fox,	470
Thornton *v.* Kerr,	108
v. Bussey,	1016
Thrall *v.* Seward,	283
Thurston *v.* Fairman,	124
v. Lloyd,	179
v. Perkins,	342, 346
Tibbatts *v.* Tibbatts,	24
Tick *v.* Mulholland,	173
Tiernan *v.* Doran,	455
Tiffany *v.* Crawford,	1029
Tilford *v.* Ramsey,	182, 301
Tillier *v.* Whitehead,	171, 280
Tillinghast *v.* Champlin,	571, 573
Tilotson *v.* Tilotson,	999
Tindall *v.* Bright,	437
Tindall *v.* McIntyre,	881
Tipton *v.* Nance,	934
Todd *v.* Lorah,	199
v. Rafferty,	515, 843
Tolan *v.* Carr,	516
Tom *v.* Goodrich,	282, 584, 937
Tombeckbee Bank *v.* Dumell,	356
Tomlin *v.* Goldsmith,	120
Tomlinson *v.* Burke,	150
v. Hammond,	626
v. Ward,	511, 855
Tompkins *v.* Lee,	102
v. Tompkins,	413, 1036
v. Woryard,	266
Tonkin, *ex parte*,	1156
Toof *v.* Duncan,	163
Toombs *v.* Hill,	1016
Topliff *v.* Jackson,	759
Torrey *v.* Baxter,	356
Toune, *re*,	1204
Tower, *ex parte*,	1061
Towle *v.* Meserve,	936
v. Pierce,	818
Town *v.* Hendee,	169
Towne *v.* Leach,	612
Townsend *v.* Bogart,	234
Townsends *v.* Stevenson,	405
Tracy *v.* McManus,	111
Traphagen *v.* Burt,	102
Travers *v.* Crane,	147
Travis *v.* Tobias,	436
Treadwell *v.* Brown,	610, 1016
v. Wells,	369
v. Williams,	208, 568
Trimble *v.* Coons,	202, 207
Troat, *ex parte*,	1150
Trott *v.* Irish,	462
Trowbridge *v.* Sanger,	468
v. Scudder,	78
Troy, &c. Factory *v.* Corning,	715, 926
Troy Iron and Nail Factory *v.* Winslow,	585, 1012
Truesdell *v.* Baker,	724, 955
Trump *v.* Baltzell,	646
Tucker *v.* Oxley,	310, 1163, 1176
v. Peaslee,	221, 285, 934
Tudarman *v.* Newball,	390
Tudor *v.* White	366
Turbeville *v.* Ryan,	206, 207, 209
Turk *v.* Nicholson,	373
Turnbow *v.* Broach,	403
Turner *v.* Bissell,	19
v. Burkinshaw,	666
v. McIlhaney,	106

Page

Turner *v.* Ross, 428
v. Turner, 664
Turnipseed *v.* Goodwin, 594, 673, 925, 974
Tutt *v.* Adams 181, 259
v. Land, 667, 675
Tuttle *v.* Cooper, 469
v. Eskridge, 213
Tweed *v.* Lowe, 109
Tynberg *v.* Cohen, 472
Tyner *v.* Stoops, 405, 512
Tyng *v.* Thayer, 856, 866
Tyrell *v.* Washburn, 110

Unl *v.* Bingaman, 364
v. Harvey, 120, 364
Uhler *v.* Browning, 272
v. Semple, 511, 565, 603
Ulerg *v.* Ginrich, 188
Umburger *v.* Plume, 395
Union, &c. Bank of Memphis *v.* Day, 304
Union Bank *v.* Eaton, 266
v. Hall, 357
Union Nat. Bank *v.* Bank of Commerce, 1016
Union Nat. Bank of Rahway *v.* Underhill, 258
United States *v.* Astley, 207, 225
v. Duncan, 1022
v. Hack, 581
v. King, 1200
v. Lewis, 1157
v. McGinnis, 233
v. Thomason, 233
v. Thompson, 390
v. Williams 506, 609, 616
United States Bank *v.* Binney, 27, 162, 293, 698, 883
United States Express Co. *v.* Bedbury, 433
Updegraff *v.* Rowland, 572
Updike *v.* Doyle, 331, 824
Upham *v.* Hewitt, 42
Upson *v.* Arnold, 570
Urquhart *v.* Powell, 264
Utley *v.* Smith, 648

Vaccaro *v.* Toof, 348
Vallandingham *v.* Duval, 469
Valentine *v.* Hickle, 546
Vance *v.* Blair, 917
v. Campbell, 258
v. Cowing, 489, 1012
v. Funk, 118

Page

Van Brunt *v.* Mather, 188
Vandenheuvil *v.* Storrs, 490
Vanderburg *v.* Bassett, 195
v. Hull, 18
Vanderhoef, *re*, 1070
Vanderwick *v.* Summerl, 247
Vandes *v.* Lefavor, 355
Vandewater *v.* Mills, 16
Vandike's appeal, 611, 1026
Van Doren *v.* Horton, 352
Vanduzer *v.* McMillan, 646
Van Dyke *v.* Jackson, 746, 862
Van Eps *v.* Dillaye, 470
Van Keuren *v.* Parmalee, 426
Van Kuren *v.* Trenton, &c. Co., 889, 906
Van Nees *v.* Fisher, 707, 967
Van Ness *v.* Forrest, 932
v. Van Ness, 691
Van Reimsdyke *v.* Kane, 489
Van Rensselaer *v.* Emery, 902
Van Rossum *v.* Walker, 1017
Van Scoter *v.* Lefferts, 228
Vansyckle *v.* Rorback, 95
Van Valen *v.* Russell, 507
Van Valkenburg *v.* Bradley, 356
Van Wagner *v.* Chapman, 1016
Varnell *v.* Anderson, 405
Varnum *v.* Campbell, 467
Vassar *v.* Camp, 17
Venable *v.* Levick, 167, 222
Vere, *ex parte*, 733
Vernon *v.* Manhattan Co, 366
Veyer *v.* Thornburgh, 1012
Vienne *v.* Harris, 169
Viles *v.* Bangs, 276
Villa *v.* Jonte, 108
Vinal *v.* Burrill, 355
v. West Virginia Oil Co., 460
Voorhees *v.* Jones, 19
Voorhis *v.* Child, 1011
Vosper *v.* Kramer, 604
Vuillamy *v.* Noble, 995

Waddwell *v.* Haight, 366
Wade *v.* Rusher, 781, 931
Wadley *v.* Jones, 855
Wadsworth *v.* Manning, 17, 924
Waggoner *v.* Gray, 665, 780
Wagner *v.* Fresche, 191
v. Simmons, 188
v. Wagner, 847
Wagnor *v.* Clay, 179, 266
Wait, Matter of, 613
Wait *v.* Brewster, 351, 370

	Page
Waite *v.* Dodge,	27, 459
v. Foster,	357
Wakeman *v.* Hoyt,	1061
Walcott *v.* Carfield,	168
Waldeck *v.* Brande,	367
Walden *v.* Sherburne,	172
Waldo Bank *v.* Greeley,	179
v. Lumbert,	179
Waldron *v.* Simmons,	485
Walgamood *v.* Randolph,	453
Walkenshaw *v.* Perzel,	779
Walker *v.* Clark,	448
v. Galbrath,	486
v. Goodrich,	155, 372
v. McCulloch,	390
v. Wait,	945, 994
v. Whipple,	159
Wallace, *re*,	437
v. Berger,	118
v. Fitzsimmons,	486, 1006
v. Hull,	923
v. Rippon,	97
v. Robinson,	817
v. Yeager,	258
Waller *v.* Davis,	398
v. Keyes,	301
Wallis *v.* Wheelock,	124
Walmsley *v.* Mendelsohn,	817
Walpole *v* Renfroe,	659
Walsh *v.* Cane,	426
v. Lennon,	284
Walstrom *v.* Hopkins,	398
Walton *v.* Fosten,	206
v. Walton,	1160
Walworth *v.* Henderson,	179. 187
Wamsley *v.* Lindenberger,	469
Warbritton *v.* Cameron,	923
Ward, *re*,	45
v. Barber,	354, 444
v. Bodeman,	72
v. Brigham,	8
v. Gore,	945
v. Howell,	355, 426
v. Leviston,	500
v. Thompson,	16, 32
v. Woodburn,	572
Warder *v.* Newdigate,	497
Wardwell *v.* Haight,	366
Ware *v.* Owens,	562
Waring *v.* Waring,	836, 909
Warner, *re*,	66, 1073
Warren, *re*,	65, 1016
v. Ball,	345
v. Chambers,	467
v. Farmer,	626, 1018
Warren *v.* French,	275
v. Schainwald,	522
Warren *v.* Wheelock,	918
Warren Davies, *ex parte*,	1173
Washburn *v.* Bank of Bellows Falls,	1016
v. Goodman,	309, 995
v. Washburn,	518, 815
Wass *v.* Atwater,	20
Waterbury *v.* Express Co.,	535
Waterman *v.* Dutton,	219
v. Hunt,	1168
Waters *v.* Taylor,	612, 964, 977
Watkinson *v.* Bank of Pa.,	369
Watney *v.* Wells,	665
Watson *v.* Fletcher,	138, 643
v. Miller,	486
Watt *v.* Kirby,	222
Waugh *v.* Mitchell,	477, 569, 777
Wayde *v.* Rusher,	602
Weaver *v.* Ashcroft,	574, 607
v. Tapscott,	283
v. Upton,	646
v. Weaver,	438, 1019
Webb, *re*,	1176, 1177
Webb *v.* Helion,	776
v. Leggett,	19
Weber *v.* Defor,	760
Webster *v.* Webster,	995
Weddle *v.* Stone,	999
Weed *v.* Richardson,	265
Weeks *v.* Mascoma Rake Co.,	214
Weiman *v.* Anderson,	97
Weld *v.* Peters,	229
Weldon *v.* Beckel,	82, 710
Welker *v.* Wallace,	245
Welles *v.* March,	167, 181
Wellington *v.* McIntosh,	763, 764
Wells *v.* Atwater,	66
v. Babcock,	22
v. Carpenter,	923
v. Evans,	182, 209
v. Mitchell,	229
v. Strange,	780, 894
v. Wilson,	981
Welsh *v.* Speakman,	117
Wentworth *v.* Raignel,	245, 946
Wescott *v.* Price,	934
West *v.* Chosten,	604
v. Hickory Mining Assoc.	566
v. Randall,	489
v. Skipp,	613
Westcott *v.* Tyson,	518
Western Stage Co. *v.* Walker,	355, 535
Weston *v.* Barton,	483

Page

Weston *v.* Ketcham, 522
Westphall *v.* Henney, 774
West Point Foundry Assoc. *v.* Brown, 7
Wetter *v.* Schlieper, 183
Whaley *v.* Moody, 182
Wharton *v.* Clements, 234
Wheatley *v.* Tutt, 444
Wheatly *v.* Calhoun, 516, 560
Wheeler *v.* Arnold, 631, 934
t. Bullard, 467
v. Rice, 268
v. Sage, 517, 529
Whigham's appeal, 625
Whipple *v.* Parker, 6
Whitaker *v.* Brown, 120, 190, 191
Whitcomb *v.* Converse, 687, 688
White *v.* Dougherty, 506, 609
v. Gibson, 226
v. Hackett, 1018
v. Harlow, 939
v. Jones, 195, 487, 607, 739
v. Kearney, 163, 355
v. Kirney, 990
v. Murphy, 366
v. Parish, 574, 894
v. Savery, 436
v. Smith, 315, 476
v. Tudor, 468
v. Union Ins. Co., 355, 1016
v. Warde, 942
v. White, 822, 841
v. Woodward, 507
White Mountain Bank *v.* West, 564
Whitehall *v.* Shickle, 19
Whitehead *v.* Bank of Pittsburgh, 355
v. Darling, 862
Whitesides *v.* Collier, 943
v. Lafferty, 522, 909
Whitewright *v.* Stimpson, 492
Whiting *v.* Furranet, 372
Whitlock *v.* McKechnie, 146
Whitman *v.* Boston, &c. Railroad, 487
v. Leonard, 342, 349, 976
v. Porter, 640
v. Robinson, 900
Whitmore *v.* Adams, 182
v. Parks, 512, 757
v. Shiverick, 586
Whitney *v.* Cotton, 565, 566
v. Ludington, 42
v. Sterling, 119
Whittaker *v.* Brown, 179

Page

Whittemore *v.* Elliott, 469
Whittle *v.* McFarlane, 514
Whitworth *v.* Ballard, 348
v. Harris, 796
Wickliffe *v.* Eve, 777
Widdifield *v.* Widdifield, 108
Wiegand *v.* Copeland, 553
Wiesenfeld *v.* Byrd, 488
Wiggins *v.* Cummings, 944
Wilbey *v.* Phinney, 929
Wilcox *v.* Dodge, 17
v. Jackson, 185
v. Kelogg, 574
v. Matthews, 105
v. Wilcox, 583, 599
Wild *v.* Davenport, 40, 1039
Wilder *v.* Keeler, 1016
v. Morris, 354
Wildes *v.* Fessenden, 396
Wiles *v.* Maddox, 507, 616
Wilkins *v.* Davis, 967, 1084
v. Pearce, 212
Wilkinson *v.* Griswold, 373
v. Henderson, 404, 489
v. Jett, 30
v. Yale, 569
Willet *v.* Chambers, 270
Willett *v.* Stringer, 214, 245
Willey *v.* Carter, 229, 559
William *v.* Roberts, 228
v. Waugh, 426
Williams, *ex parte*, 1176
Williams, *re*, 145, 1020, 1065
v. Barnett, 228
v. Birch, 366
v. Bowers, 366
v. Boyd, 397
v. Brimhall, 276
v. Gage, 609, 1024
v. Gilchrist, 266
v. Gillies, 146
v. Henshaw, 930
v. Hitchings, 390
v. Hodgson, 208
v. Love, 602, 606
v. Mathews, 350
v. More, 280
v. Nicholson, 774
v. Rogers, 420, 468
v. Soutter, 109
v. Walbridge, 265, 266
v. Wilson, 746
Williamson *v.* Fontain, 568
v. Fox, 370
v. Haycock, 818

	Page
Williamson *v.* McGinnis,	390
v. Munroe,	906
v. Wilson,	337, 994
Willings *v.* Consequa,	390
Willis *v.* Freeman,	1016
v. Hill,	284
Willson *v.* Fitcher,	902
Wilson, *re*,	1070, 1199
v. Bowden,	573
v. Coleman,	106
v. Connie,	1016, 1024
v. Dargan,	200
v. Greenwood,	732
v. Hunter,	205, 206
v. Lovelace,	108
v. McConnell,	1016
v. Richards,	182
v. Soper, 491, 584, 586,	683, 1017
v. Stewart,	147
v. Stillwell,	757
v. Strobach,	607
v. Torbet,	355
v. Wallace,	459, 461
v. Williams,	266
v. Wilson,	127
Wilt *v.* Bird,	943
Wiltram *v.* Van Wormer,	189
Wimpee *v.* Mitchell,	1013
Windham County Bank *v.* Kendall,	182
Winkens, *ex parte*,	1199
Winship *v.* Bank of United States,	161, 164, 261
Winslow *v.* Cheffelle,	105
Winsor *v.* Kendall,	1083
v. McLellan,	1083, 1091
v. Savage,	665
Winston *v.* Taylor,	336
Winter *v.* Innes,	403
Wintersmith *v.* Pointer,	1016, 1024
Wise *v.* Copley,	498
v. Williams,	453
Wisenfield *v.* Byrd,	375
Wisham *v.* Lippincott,	1017
Witcher *v.* Brewer,	233
Withers *v.* Withers,	714
Witler *v.* Richards,	609
Witter *v.* M'Neil,	288
Woddsop *v.* Ward,	1016
Wolbert *v.* Harris,	906
Wolf *v.* Mills,	234
Wolfe *v.* Gilmer,	394, 594
Wolff *v.* Shelton,	859
Wolle *v.* Brown,	172
Wood *v.* Connell,	227
Wood *v.* Cullen,	55, 472
v. Deutchman,	930
v. Erie Ry. Co.,	125
v. Fox,	848
v. Gault,	955
v. Goss,	225
v. Johnson,	626
v. Merrow,	918
v. Montgomery,	559
v. O'Kelly,	459
v. Pennell,	56
v. Scoles,	665
v. Shepard,	255
v. Shepherd,	175
v. Wood,	1005
Woodbury *v.* Sackrider,	218
Woodruff *v.* King,	214, 342
Woods *v.* Quarles,	118
Woodward *v.* Clark,	55
v. Francis,	882
v. Horst,	200
v. Newhall,	469
v. Winship,	166
Woodworth *v.* Downer,	356
v. Fuller,	455
v. Spafford,	308
Wray *v.* Hutchinson,	977
Wright *v.* Ames,	163
v. Brosseau,	332
v. Cumpsty,	932
v. Eastman,	925
v. Harris,	450
v. Hooker,	145, 289, 933
v. Michie,	922
v. Storrs,	489
v. Ward,	609, 781
v. Williamson,	436
Wycoff *v.* Purnell,	929
Wyman *v.* Chicago & Alton R. Co.,	42
Yale *v.* Eames,	357
v. Yale,	275
Yancey *v.* Mariott,	117
Yandef *v.* Lefavour,	195
Yates *v.* Watson,	468
Yeager *v.* Wallace,	263, 535
Yeatman *v.* Woods,	568
Yocum *v.* Benson,	106
Yoke *v.* Barrett,	688, 881, 937
York *v.* Clemens,	108, 955
York Bank's appeal,	446, 708
Young, *ex parte*,	684, 733
v. Brick,	942

	Page
Young *v.* Clute,	687
v. Pearson,	832
v. Smith,	55, 174
v. Tibbitts,	368
Zallar *v.* Janvrin,	366
Zane *v.* Thomas,	138
Zarega, *ex parte*,	1200
Zimmerman *v.* Erhard,	97, 125
v. Huber,	644, 645
Zook *v.* Clemens,	561
Zuel *v.* Bowen,	179

ADDITIONS AND CORRECTIONS.

Page 17, note (*m*) See below, p. 38, note (*d*).

" 34, line 4 See below, p. 38, note (*d*).

" 36, note (*t*) } See below, p. 38, note (*d*).
" 37, note (*a*) }

" 38, note (*d*) *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536, was reversed on appeal (9th Feb. 1888) W. N. 1888, p. 30, so far as the Court below decided that the lender was liable for the debts of the borrower. The advances were made to enable the borrower, a railway contractor, to perform a contract to make a railway; the advances were to be employed for this purpose; the benefit of the contract and the borrower's plant, &c., were assigned to the lender as a security for the loan; and the lender was empowered to take possession of the plant, &c., and himself to complete the contract if necessary. The borrower agreed to repay the advances with interest at the end of six months after they were made, and there was a proviso for redemption on such repayment. The borrower also agreed to pay the lender a share of the profits rising from the contract with the railway company when that contract should be completed, and it was stipulated that in ascertaining those profits the borrower should be allowed certain sums for himself. There was a mass of correspondence relied upon for the purpose of showing that the borrower and lender were really partners, and Mr. Justice Stirling decided that the correspondence showed that this really was the case. The Court of Appeal differed from him on this point, and held that the correspondence was consistent with the formal security, and that the contract between the parties was really what it purported to be, viz. a contract of loan upon security. The Court of Appeal decided that, although the case was not within § 1 of Bovill's Act, it came within the principles laid down in *Cox* v. *Hickman* and *Mollwo March & Co.* v. *Court of Wards*. The statement in the text on p. 34, lines 1 to 7, may, it is apprehended, be now safely relied upon. The Court of Appeal confirmed the decision in *Badeley* v. *Consolidated Bank* on the construction put on § 5 of Bovill's Act: see p. 36, note (*t*), and p. 37, note (*a*).

Compare the last case with *Frowde* v. *Williams*, 56 L. J. Q. B. 62, in which a would-be lender was held to be a partner with the borrower.

Page 60, line 5 — After (*n*) add. "unless he and his co-tenants are under some duty or obligation to others to repair": see the authorities in notes (*m*) and (*n*).

" 78, note (*h*) — Add *Ex parte Coulson*, 20 Q. B. D. 249.

" 99, note (*p*) — For 55 Geo. 3, c. 104, *read* c. 194.

" 126, note (*y*) / " 138 — See also *Simpson's Claim*, 36 Ch. D. 532, where a company was held not liable on a promissory note given by its general agent as security for a guarantee given by the promissee for payment of goods ordered by the agent for the company.

" 141, note (*l*) — *Blackburn, Low & Co.* v. *Vigors* was reversed by the House of Lords: see 12 App. Ca. 531.

" 143, note (*t*) — *Lacey* v. *Hill*, 4 Ch. D. 537, was affirmed by the House of Lords under the name of *Reed* v. *Bailey*, 3 App. Ca. 94.

" 163 — See also *Sawyer* v. *Goodwin*, 36 L. J. Ch. 578, where a firm was held liable for the fraudulent act of a partner who had falsified an abstract of title for the purpose of concealing prior incumbrances.

" 180, 185 — In *Odell* v. *Cormack*, 19 Q. B. D. 223, a bill drawn on *Cormack Brothers* was accepted by Carter for *Margaret Cormack & Self*. Carter was not a partner with her, and had no authority to accept bills for either in her own name or in the name of the firm in which she carried on business, and she was held not liable on the bill.

" 191, note (*y*) — See also *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 674, which is under appeal.

" 191, note (*z*) — For Book III. c. 3, § 1, *read* c. 6, § 3, p. 381 *et seq.*

" 193, note (*k*) / " 255, note (*s*) / " 256 notes (*x*) and (*c*) / 264 / " 281 — *Kendall* v. *Hamilton*, 4 App. Ca. 504, decided two points, viz., 1, that ordinary partnership debts are not joint and several; 2, that a judgment by a joint creditor of a firm against one partner in an action brought against him only, discharges his co-partners, although the judgment is unsatisfied and although the co-partners were unknown to the creditor when he recovered judgment. This last rule, although now settled to be law, rests on technical reasoning, and if not carefully limited in its application will lead to unexpected and unjust results. In *Cambefort* v. *Chapman*, 19 Q. B. D. 229, the rule was, however, extended very considerably. In that case the facts were as follows. *Wilson & Chapman* carried on business under the name of *Wilson & Co.*, and became indebted to the plaintiff for goods sold and delivered. The plaintiff only knew *Wilson: Chapman* was a dormant partner. *Wilson & Chapman* dissolved partnership, but the plaintiff was ignorant of this. After the dissolution the plaintiff drew a bill on

Wilson & Co., and *Wilson* accepted it in that name. The bill was given for the partnership debt, and was dishonored. The plaintiff sued *Wilson & Co.* on the bill and obtained judgment against *Wilson & Co.*, but could not get payment from *Wilson*. The plaintiff afterwards sued *Chapman* for the goods; but it was held that the bill having been given for the goods, and not as a collateral security only (as to which, see p. 256, note (*c*), and p. 704, notes (*d*) to (*h*), the action on the bill was in substance an action against *Wilson* for the goods, and that the judgment against him, although unsatisfied, afforded *Chapman* a good defence to the action against him. Observe that the bill did not bind him, nor did the judgment. But *quære* whether *Kendall* v. *Hamilton*, applies to such a case?

Page 264, notes (*b*) and (*c*) " 280, note (*d*) } If one only of several joint contractors is sued he can require the others to be made defendants: *Pilley* v. *Robinson*, 20 Q. B. D. 155.

" 267, notes (*x*) and (*y*) " 273, note (*h*) } As to contracts with partners, which although joint in form, are in point of law joint and several owing to the separate interests of the partners, see *Palmer* v. *Mallet*, 36 Ch. D. 411, a case of a contract by an assistant not to carry on business without the consent of the partners.

" 347, note (*a*) The decision of the Court of Appeal in *A. G.* v. *Marquis of Ailesbury*, 16 Q. B. D. 408, was reversed by the House of Lords, 12 App. Ca. 672, which restored the judgment of the Divisional Court in 14 Q. B. D. 895. *Matson* v. *Swift*, 8 Beav. 368, must be taken as now overruled: see Lord Macnaghten's judgment, 12 App. Ca. 696.

" 362 (7) See a suggested form of order in Seton on Decrees 1214, n. (ed. 4), referred to in *Whetham* v. *Davey*, 30 Ch. D. 579.

" 375, note (*m*) See *Lloyd* v. *Dimmack*, 7 Ch. D. 398, where *Ranelagh* v. *Hayes* was disapproved, and the Court declined to decree specific performance of a covenant to indemnify with liberty to apply in the event of future breaches which might or might not occur. *Lloyd* v. *Dimmack* is, however, not opposed to the statements in the text nor to the cases cited in p. 375, notes (*h*), (*i*) and (*l*). See the last direction in the order, 7 Ch. D. 402.

THE

LAW OF PARTNERSHIP.

INTRODUCTORY.

1. *Meaning of the word "partnership,"* *1.
2. *Distinction between partnerships, corporations and companies,* *4.

1. *Meaning of the word "partnership."*

To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyze the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion.

Without attempting, then, to define the terms "partners" and "partnership," it will suffice to point out as accurately as possible the leading ideas involved in those words. The terms in question are evidently derived from *to part*, in the sense of to divide amongst or share, and this at once limits their application, although not very precisely—for persons may share almost anything imaginable, and may do so either by agreement amongst themselves or otherwise. But, in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the

profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and *that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. (*a*)

*2]

Partnership, though often called a contract, is in truth the result of a contract; the relation which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits. [1]

By some writers associations which have not gain for their object are occasionally termed partnerships, and even in the Companies act, 1862, partnerships having gain for their object are referred to, and the reader is thereby led to suppose that there may be partnerships of some other kind. (*b*) But to use the word "partnership" to denote a society not formed for gain is to destroy the value of the word, and can lead only to confusion. (*c*) Nor is it consistent with modern usage. Lord Hale and older writers use copartnership in the sense of co-ownership, but this is no longer customary; and, as will be shown hereafter, there are many important differences between the two. (*d*)

Although, for the reasons already stated, the writer has not attempted to give a definition of the term "partnership," he appends for the consideration of the reader the following definitions taken from works of celebrity:

Civil Code of New York.—Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. (*e*)

(*a*) Mollow, March & Co. *v.* Court of Wards, L. R., 4 P. C. 436; R. *v.* Robson, 16 Q. B. D. 137.

1. Thus, it is held that a partnership, with all its incidents, may be created without articles in writing. Buffum *v.* Buffum, 49 Me. 108.

In Louisiana, partnership and community are not to be confounded. The first is based on the contract of the parties, which thus creates the community; the last may exist independently of any contract whatsoever. Pickerell *v.* Fisk, 11 La. Ann. 277. And it is well settled that as to third persons a partnership may be created by construction of law, though not intended, and not actually existing as between the parties. New Orleans *v.* Ganthreauz, 32 La. Ann. 1126; Baldy *v.* Brackenridge (La.), 2 So. Rep. 410; but not so unless the third persons have been misled by concealment of facts, or by deceptive appearances. Beecher *v.* Bush, 45 Mich. 188; S. C., 40 Am. Rep. 465.

(*b*) See section 4 of the act.

(*c*) See as to clubs, *infra*, ch. 1, § 5.

(*d*) See *infra*, ch. 1, § 6.

(*e*) Civil Code of the State of New York, § 1283.

Code Civil.—La société est un contrat, par léquel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter. (*f*)

Dixon.—A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit. (*g*)

Domat.—La société est une convention entre deux ou plusieurs personnes, par laquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque autre affaire, pour *partager tous ce qu'ils pourront avoir de gain ou souffrir de perte de ce qu'ils auront mis en société. (*h*) [*3

Kent.—Partnership is a contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. (*i*)

Indian Contract Act.—Partnership is the relation which subsists between persons who have agreed to combine their property, labor or skill in some business, and to share the profits thereof between them. (*k*)

Parsons.—Partnership is the combination by two or more persons of capital, or labor or skill, for the purpose of business for their common benefit. (*l*)

Pollock.—Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them. (*m*)

Pothier (1).—Le contrat de société est un contrat par lequel deux ou plusieurs personnes mettent, ou s'obligent de mettre, en commun quelque chose, pour faire en commun un profit honnête, dont ils s'obligent reciproquement de se rendre compte. (*n*)

Pothier (2).—Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac lictum in commune faciendi. (*o*)

Prussian Code.—Ein Vertrag durch welchen mehrere Personen ihr Vermögen oder Gewerbe oder auch ihr Arbeiten und Bemühungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag gennant. (*p*)

Pufendorf.—Le contrat de société se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, à la charge de partager entr'eux le gain et de supporter les pertes qui en arriveront, chacun à proportion de ce qu'il contribue du sien. (*q*)

Rutherford.—When two or more persons join money, or goods, or labor, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership. (*r*)

(*f*) Code Civil, § 1832.

(*g*) Dixon's Law of Partnership 1.

(*h*) Domat, les Lois Civiles, liv. i., tit. 8, § 1.

(*i*) 3 Kent's Com. 23.

(*k*) Indian Contract act, § 239.

(*l*) Parsons on Part., ch. 2, § 1. This definition is inaccurate. The word denotes a combination of persons, not a combination of capital.

(*m*) Pollock's Digest of the law of Partnership (3d ed.), § 4.

(*n*) Pothier, Traité du Contrat de Société, § 1. There is a useful English edition of this work by O. D. Tudor, Esq.

(*o*) Pothier, Pand., lib. xvii., tit. 2, art. 1, § 1.

(*p*) Allgem. Landsrecht für die Preuss. Staat., th. i., tit. 3, § 169.

(*q*) Pufendorf, Le Droit de la Nat. et des Gens (éd. Barbeyrac), liv. v., ch. 8, § 1.

(*r*) Inst. of Nat. Law, book i., c. 13, § 9.

Story.—Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. (*s*)

Thibaut.—Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen
*4] *Endzwecks so wird diesz ein Gesellschaftsvertrag (*societas*, Mascopei, Mageuschaft) gennant. Geschieht diese Verbindung zu eigennützigen Zwecken so nennt man sie *societas quæstuaria*, oder *negotiatoria*, sonst aber *non quæstuaria*. (*t*)

Vinnius.—Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia. (*u*)

Voet.—Societas est contractus jurisgentium, bonæ fidei, consensu constans, semper re honesta, de lucri et damni communione. (*x*)

Watson.—Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade. (*y*)

All the above definitions, however, with the exception of Mr. Dixon's, are, with reference to the law of England, too wide; for they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects, and which it is better, therefore, not to denote by the same word. Mr. Dixon's definition avoids this error, but the relation of principals to which he refers is not altogether free from objection. (*z*) [2]

If partnership is defined so widely as to include incorporated and

(*s*) Story on Part., § 2.

(*t*) Thibaut, System des Pandekten Rechts (9th ed.), § 467. This division of partnerships into partnerships having gain for their object, and other partnerships, is noticed by most German writers on the civil law.

(*u*) Vinn. Inst. iii. 26.

(*x*) Voet Comm. ad Pand., lib. xvii., tit. 2, Pro Socio, § 1.

(*y*) Watson on Part. 1. This definition is copied by Gow in his work on Partnership.

(*z*) See the observations of the Master of the Rolls on the above definitions, in Pooley *v.* Driver, 5 Ch. D. 471 *et seq.*

2. Partnerships have been variously defined. "A mutual participation in profit and loss." Tindal, C. J., in Green *v.* Busley, 2 Bing. N. C. 108. See, also, definition by Patterson, J., in Bond *v.* Pittard, 3 M. & W. 357.

A partnership arises when two or more persons agree to combine property or labor, or both, in a common undertaking, sharing profit and loss. Perry *v.* Butt, 14 Ga. 699; Solomon *v.* Solomon, 2 Ga. 18; Gregory *v.* Dodge, 14 Wend. (N. Y.) 593. See, also, Chapman *v.* Wilson, 1 Rob. (Va.) 267. It is a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses. Chapman *v.* Devereux, 32 Vt. 616. It is the existing community of interest and participation in profit and loss that constitutes a partnership. Felichy *v.* Hamilton, 1 Wash. (U. S.) 491.

other companies, partnerships must be subdivided into (1) ordinary and (2) extraordinary partnerships, as in the Indian Contract act. (*a*) But it is more in accordance with ordinary usage to confine the word to unincorporated societies not governed by any special statute or custom.

2. *Distinction between partnerships, corporations and companies.*

CORPORATIONS.—A corporation is a fictitious person, created by special authority (by the law of England by the crown or by par*liament), and endowed by that authority with a capacity [*5 to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitous person composed of those individuals; nor are the rights and obligations of the body corporate exercisable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. As the civilians neatly express it —*Si quid uni versitati debetur singulis non debetur, nec quod debet universitas singuli debent.*

With partnerships the case is otherwise; the members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually: *Si quid societati debetur singulis debetur et quod debet societas singuli debent.* (*b*)

COMPANIES. 1. *Unincorporated.*—The fundamental distinction between partnerships and unincorporated companies is that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty, without the consent of all, to retire from the firm and substitute other persons in their places; whilst a company consists of a large number of individuals not necessarily nor, indeed, usually, acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not. (*c*)

(*a*) See section 266.

(*b*) See Lloyd *v.* Loaring, 6 Ves. 773; Beaumont *v.* Meredith, 3 Ves. & B. 180; Ryhope Coal Co. *v.* Foyer, 7 Q. B. D. 498.

(*c*) See per James, L. J., in Smith *v.* Anderson, 15 Ch. D. 273.

Nearly all the differences which exist between ordinary partnerships and unincorporated companies will be found traceable to the above distinction. Indeed, it may be said that the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating number of members.[3]

3. Unincorporated associations or companies, when partnerships—Associates in business ventures not purporting on their face to be partnership transactions, have often been held to be partners, at least as to third persons. Thus, the individual members of a voluntary association organized to relieve its members in case of sickness or distress, are partners. Gorman *v.* Russell, 14 Cal. 531.

Although it appears that persons sued as purchasers of goods were organized as a joint stock company, yet, if they were not incorporated, they constitute a partnership, and, though an extensive one, are, in the main, subject to the rules and liabilities governing that relation. Manning *v.* Gasharie, 27 Ind. 399.

While joint stock associations are not in all cases copartnerships (Cox *v.* Bodfish, 35 Me. 302), yet where the organization of a manufacturing company is so defective as to fail to create a corporation, the associates become, in legal effect, partners, with the rights of partners to the property acquired by the company. Whipple *v.* Parker, 29 Mich. 369. So persons who enter into articles of association for banking purposes, and without any charter, assume a name, open a stock book, subscribe for shares of stock (a portion paying small sums thereon), hold meetings, elect directors, publish the names of such directors (none of whom take any steps to inform the public that they do not belong to the association), enter into and transact business as a bank, are all liable as partners. Pettis *v.* Atkins, 60 Ill. 454. See, also, Haslett *v.* Wotherspoon, 2 Rich. (S. C.) Eq. 395. And where two or more persons agree to form a corporation, some putting in machinery and patents, and others money and labor; but no corporation is formed by reason of a failure to comply with the statute, if the parties are entitled to share in the profits and losses, it will constitute a *quasi* partnership, although the title to the property put in, whether real or personal, may not be changed. Flagg *v.* Stowe, 85 Ill. 164.

So, also, where stockholders in a manufacturing corporation, whose charter has expired, agree to continue the business in the corporate name, appointing one of their number as managing agent to carry on the business, and agree to furnish money when called for by him, in proportion to the number of shares held by each, they are liable to third persons as partners, upon commercial paper made by such agent for the benefit of the firm, and signed with the name of the former corporation by him as agent. National, &c., Bank *v.* Landon, 45 N. Y. 410.

In New York it is held that, except as otherwise provided by statute, all joint stock associations are partnerships, and a creditor must proceed against the surviving shareholders before an action can be maintained against the representatives of a deceased shareholder. Moore *v.* Brink, 6 Thomp. & C. (N. Y.) 22; S. C., 4 Hun 402.

So, where partners, intending to form a corporation, subscribe for stock, establish the business and appoint a superintendent, they continue liable as partners until the articles of association are signed. Martin *v.* Fewell, 79 Mo. 401.

And in Connecticut, where persons, de-

2. *Incorporated Companies.*—Incorporated companies are societies consisting usually of *many persons, having transferable shares in a common fund, but incorporated by royal charter or by

*6]

siring to secure provisions for themselves without the costs of middlemen, associate themselves together without incorporation, open a store under a distinguishing associate name, viz.: "Bridgeport Co-operative Association," and conduct the business through their own managers, who are authorized to go into the market and buy provisions in the associate name, which are resold at cost to the members and the public generally, the members of such association are liable, as individuals, for goods so bought by the managers, although they never held themselves out as partners, and credit was not given to them as such, or as individuals. Davison *v.* Holden, 10 Atl. Rep. 515.

The following combinations or associations have been held to constitute partnerships and not corporations:

A joint stock company, formed for the purpose of dealing in lands. Clagett *v.* Kilbourne, 1 Black (U. S.) 346; Kramer *v.* Arthurs, 7 Pa. St. 165.

An association of separate owners of several steamboats into a joint concern, to run their vessels upon a certain river, and to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid. The Swallow, Olc. (U. S.) Adm. 334.

An unincorporated body of men, associated for the purpose of banking. Boisgerard *v.* Wall, 1 Sm. & M. (Miss.) Ch. 404.

A voluntary unincorporated association for manufacturing purposes, the articles of agreement providing that each stockholder should pay a certain sum per share, at the time of subscribing, and all subsequent assessments, or forfeit his stock. Skinner *v.* Dayton, 19 Johns. (N. Y.) 513.

Members of an unincorporated association described as "stockholders" in their written agreement, agreeing to take a certain number of "shares" at a certain price per share for the purpose of starting a grocery store, supposing that their losses were limited to the amount of their shares. Farnum *v.* Patch, 60 N. H. 294; S. C., 49 Am. Rep. 313.

When not deemed partners.—On the other hand, it was held in the New York Court of Chancery, that where persons held meetings and subscribed for stock in a proposed corporation for running a particular steamboat, but failing to obtain a charter it was finally agreed to form a limited partnership, but the provisions of the act in relation to such partnership had not been complied with, that such persons were not liable, as general partners, for debts contracted in the meantime by the owner of the boat for repairs. West Point Foundry Assoc. *v.* Brown, 3 Edw. (N. Y.) Ch. 284.

In New Jersey, in the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company is incorporated, persons who have contracted with a *de facto* corporation cannot deny its corporate existence, in order to charge its shareholders individually as partners. Stout *v.* Zulick, 7 Atl. Rep. 362.

And in Massachusetts, stockholders in a corporation, doing business under a defective organization, do not thereby become partners, general or special, in such business. Fay *v.* Noble, 7 Cush. (Mass.) 189. Nor are corporate stockholders liable as partners on commercial paper given by the treasurer, merely because no corporate business is transacted after organization, nor because the paper was given for debts

act of parliament. They are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both; and the law relating to these companies depends as well on the principles which govern ordinary partnerships as on those which are applicable to corporations strictly so called. (*d*)

The present volume is confined to partnerships in the ordinary sense. Incorporated companies and companies which, although unincorporated, consist of numerous members and are governed by special statutes or by special customs, *e. g.*, Cost Book Mining Companies, will be dealt with in another volume.

which the company was not authorized to contract. Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83. See, also, Ward *v.* Brigham, 127 Mass. 24; and Mass. Dig., tit. "Voluntary Association." So, also, the members of a masonic lodge are presumptively not partners. Ash *v.* Guie, 97 Pa. St. 493; S. C., 39 Am. Rep. 818.

(*d*) See the judgments in 5 Ch. 431, 732. As to when corporations are persons within the meaning of acts of parliament, see The Pharmaceutical Soc. *v.* The London and Provincial Supply Assoc., 5 Q. B. D. 310; affirmed, 5 App. Cas. 857.

BOOK I.

OF CONTRACTS OF PARTNERSHIP.

7*]

CHAPTER I.

THE NATURE OF THE CONTRACT DETERMINED.

PRELIMINARY OBSERVATIONS, *7.
SECTION I.—OF TRUE PARTNERSHIPS, *10.
SECTION II.—OF QUASI PARTNERSHIPS, *25.
SECTION III.—OF SUB-PARTNERSHIPS, *48.
SECTION IV.—OF GENERAL AND PARTICULAR PARTNERSHIPS, *49.
SECTION V.—OF CLUBS AND SOCIETIES NOT HAVING GAIN FOR THEIR OBJECT, *50.
SECTION VI.—OF CO-OWNERSHIP, *51.

PRELIMINARY OBSERVATIONS.

Agreement to share profits the essence of a partnership.—The basis of all partnerships is an agreement to share the profits arising from some business or undertaking. Usually, but not necessarily, partners have a joint capital or stock, by the employment of which the profits to be shared are expected to arise; and in ordinary partnerships, but not in companies, each partner usually takes an active part in the prosecution of the partnership business. Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them. But, although this is so, the usual characteristics of an ordinary partnership are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in.

Profits and losses.—Profits (or net profits) are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained.

Gross profits. Net profits.—Profits and net profits are, for all legal purposes, synonymous expressions; but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits in order to avoid confusion. In the *present treatise, however, the word "profits" will be used in the sense of net profits, and the expression "gross profits" will be avoided as much as possible.

*8]

Persons who share both advances and returns, and also persons who share the difference between them, whatever that difference may be, necessarily share both profits and losses; profits, if the returns exceed the advances; losses, if the advances exceed the returns. But persons who share profits, *i. e.*, the excess of returns over advances, do not necessarily share losses, for profits may be shared by those who make no advances; and persons may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others, so that whilst all share profits some only bear losses.

Sharing gross returns.—The actual or gross returns obtained by advances obviously include profits, if profits have been made. But those returns do not include losses, if losses are incurred; for losses are the excess of the advances over the returns, and come out of the advances and not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not, *by sharing the returns*, share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits, if there are any, it is so only incidentally, and because such profits are included in what is divided; it is not a division of profits as such, and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or not.

On the other hand, if the persons sharing gross returns also share the advances by means of which the returns are made, there is necessarily community both of profit and of loss; community of profit if the returns exceed the advances, community of loss if the advances exceed the returns.

Distinction between sharing profits and gross returns.—The above remarks have appeared necessary in order to explain the reasons for the distinction made by English lawyers between agreements to share profits (*i. e.*, net profits and profits as such) on the one hand, and agreements to share gross returns (sometimes called gross profits) on

the other; and in order to account for the rule that whilst an agreement to share profits creates a partnership, an agreement to share gross *returns does not. The reasonableness, however, of the above distinction is very questionable, at least where there is any [*9 community of capital or common stock, and the rule itself is probably attributable less to the difference which exists between net profits and gross returns than to the doctrine which so long confused the whole law of partnership in this country, and according to which all persons who shared profits incurred liability as if they were really partners. When this doctrine was rife, the distinction between sharing net profits and gross profits (*i. e.*, returns) had considerable practical value, but, as will be seen hereafter, the doctrine in question is now wholly exploded, and the distinction alluded to is of little importance.

Quasi partnerships.—The doctrine to which reference has been made renders it necessary to caution the reader against an ambiguity in the word "partnership" as used by English lawyers. Partnerships are by them divided into partnerships (properly so called) and partnerships as regards third persons, which are not in fact partnerships at all and should never be so styled. What is called a partnership as regards third persons (*quasi* partnership) is nothing more than a number of persons who, in consequence of certain acts done by them, are held liable for each other's conduct, as if they had entered into a contract of partnership amongst themselves. What these acts are will be considered hereafter; but the reader is requested to bear in mind that for the present partnerships properly so called, and not *quasi* partnerships, are intended to be spoken of.

Having made these preliminary observations, it is proposed to consider what agreements do and what do not result in a partnership in the proper sense of the word.

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*SECTION I.—OF TRUE PARTNERSHIPS.

*10]

1.—*Partnership is the result of an agreement to share profits and losses.*

Agreements to share profits and losses.—Whether an agreement creates a partnership or not depends on the real intention of the parties

to it. (*a*)[1] If the agreement is not in writing, the intention of the parties must be ascertained from their words and conduct. If the agreement is in writing, its true construction must be determined; but, as will be more fully shown in a subsequent chapter, even a written contract may be departed from and modified by a new verbal agreement between all the partners proved by conduct inconsistent with the written document. (*b*)

But an agreement to share profits and losses may be said to be the type of a partnership contract. Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business or adventure, upon the terms of sharing the profits *and* losses arising therefrom, are necessarily to some extent partners in that trade, business or adventure; nor is the writer aware of any case in which persons who have agreed to share profits and losses have been held not to be partners. (*c*) But it does not follow that each of several persons who share profits and losses has all the rights which partners usually have. For example, a person may share profits and losses and yet have no right actively to interfere with the management of the business; (*d*) or he may have no such right to dissolve as an ordinary partner has; (*e*) or he may have no right *to share the good will of the business on a dissolution; and other instances of restricted rights may be suggested. What, in any given case, the rights of a particular partner are depends on the agreement into which he has entered; but unless the word "partner" is to be deprived of all [*11

(*a*) Mollwo, March & Co. *v.* Court of Wards, L. R., 4 P. C. 419; Pooley *v.* Driver, 5 Ch. D. 460; Walker *v.* Hirsch, 27 Ch. D. 460; Ross *v.* Parkyns, 20 Eq. 331, and other cases cited *infra*, p. 13, note (*r*).

1. Consent or intention essential.—The relation cannot exist as between the parties without their voluntary consent (Hedge's Appeal, 63 Pa. St. 273), and whether it so exists or not depends upon their intentions, as legally ascertained. Salter *v.* Ham, 31 N. Y. 321; Hazard *v.* Hazard, 1 Story (U. S.) 371; Stevens *v.* Faucet, 24 Ill. 483; Niehoff *v.* Dudley, 40 Ill. 406; Macy *v.* Combs, 15 Ind. 469; Gray *v.* Gibson, 6 Mich. 300.

(*b*) *Infra*, book III., c. 9.

(*c*) In Mair *v.* Glennie, 4 M. & S. 240, the expression "profit or loss" seems to have been used for gross returns. And in Geddes *v.* Wallace, 2 Bligh 270, the arrangement as to profit and loss did not apply to the person as to whom the question of partnership or no partnership was raised.

(*d*) As in Walker *v.* Hirsch, 27 Ch. D. 460.

(*e*) See, as to this, Moore *v.* Davis, 11 Ch. D. 261; Pawsey *v.* Armstrong, 18 Ch. D. 698, in both of which the right to dissolve was held to exist. But *qu.* whether Pawsey *v.* Armstrong did not go too far.

definite meaning its proper application to persons who share profits and losses can hardly be questioned. (*f*)

Accordingly, in Green *v.* Beesley, (*g*) a partnership was held to result from an agreement that the plaintiff should horse a mail cart and be paid by the defendant £9 per mile per annum for so doing, and that the plaintiff and the defendant should share the expenses of repairing and replacing the carts, and the moneys received for the conveyance of parcels, and the losses occasioned by their loss or damage.

So, in Brett *v.* Beckwith, (*h*) a partnership was held to exist between underwriters, one of whom had agreed to take a joint share of the underwriting risks of the other, paying or receiving sums according to the result of the accounts.

These authorities are sufficient to show that an agreement to share profit and loss is an agreement for a partnership, although the words "partners" or "partnership" do not occur in the agreement. (*i*) 2

(*f*) See, however, the judgment of Cotton, L. J., in Walker *v.* Hirsch, 27 Ch. D. 460.

(*g*) 2 Bing. N. C. 108.

(*h*) 3 Jur. (N. S.) 31, in the Rolls.

(*i*) See, too, Greenham *v.* Gray, 4 Ir. Com. L. Rep. 501.

2. **Community of profit and loss.**— To constitute a partnership *inter sese*, there must be an existing community of interest and participation in profit and loss. Felichy *v.* Hamilton, 1 Wash. (U. S.) 491. And the proportion of the profits each partner is to have must be determined. Pleasants *v.* Fant, 22 Wall. (U. S.) 116.

Community of profits and losses is the true test of partnership. Where neither element exists, there is no partnership. Chapman *v.* Lipscomb, 18 So. Car. 222; Dils *v.* Bridge, 23 W. Va. 20.

A mere joint proprietorship or contract will not constitute a partnership, *e. g.*, a joint and several undertaking between two persons, such as a guaranty of payment of a bond; there must be a mutual interest in profit and loss. Ex parte Miller, 1 N. Y. Leg. Obs. 38. When, however, an agreement provides for a division of profits and losses in a business, and imposes upon the parties a mutual duty to account, it creates a partnership. Priest *v.* Chouteau, 12 Mo. App. 252. But a mere agreement to share in profits and losses does not necessarily make the parties partners *inter sese*. McDonald *v.* Matney, 82 Mo. 358. Although it furnishes the usual test of a partnership. Jones *v.* Call, 93 N. C. 170.

Where the elements of joint expense, joint property, joint fund, joint losses and joint profits are all absent, and there is no arrangement to share profit and loss, there is no partnership. A communion of profit is of the very essence of a partnership, which relation cannot, in contemplation of law, exist without it. Irvin *v.* Nashville, &c., Ry. Co., 92 Ill. 103. In Georgia, however, before the passage of section 1890 of the code, there might be a partnership without a community of property, or agreement to share in the profits and losses. Hughuley *v.* Morris, 65 Ga. 666.

It is not requisite to the constitution of a strict partnership that each partner should, as between themselves, be liable to share indefinitely in the losses of the concern. It is sufficient if they are to

Partnership not intended.—Cases which present most difficulty are those in which persons agree to share profits and losses and at the same time declare that they are not to be partners. The question then

share in the profits and in the losses, so far as they affect the capital advanced. Nor is it necessary that the partners should be proportionate joint owners of the capital. It is enough that they are jointly interested in the profits and losses. Brigham *v.* Dana, 29 Vt. 1.

A contract, however obscurely or inartificially drawn, by which the parties agree to contribute merchandise to "a certain concern," one to be the salesman, the other to pass as proprietor, and both to share equally in the expenses and profits, constitutes a partnership. Marks *v.* Stein, 11 La. Ann. 509.

Where, after they become partners, the parties have a common interest in the unsettled business of a former concern, or in its profits and losses, they remain, *inter sese*, partners in that business. McGill *v.* Dowdle, 33 Ark. 311.

The joint purchase of a threshing machine by two persons, who give their notes for the price, under an agreement to work it together, each furnishing one-half the labor, and to divide the profits and losses equally, makes them partners. Aultman *v.* Fuller, 53 Iowa 60.

Where two firms agree to make contracts, in the names of their respective firms, for the purchase and sale of goods, to be executed with their separate funds, and to share profit and loss on such contracts, they do not become copartners, either as between themselves or with respect to third persons. Smith *v.* Wright, 5 Sandf. (N. Y.) 113.

Thus, a partnership was held to exist where a contract was entered into between several persons to buy eggs for a certain period, to pay for them with funds contributed by all, to store them and sell them on joint account, sharing equally in the profit or loss (Bohrer *v.* Drake, 33 Minn. 408); and also where A, the owner of goods in New York, sold one-half of his interest therein to B, who was to go to San Francisco and there dispose of the goods on joint account. Soule *v.* Hayward, 1 Cal. 345.

So, also, an agreement between two partners, on the dissolution of their firm, that one should take all the goods on hand, and the notes and accounts due the firm, and, in consideration of the other's interest, should pay all the outstanding debts and give the other, "from that time forward, one-third interest in the profits arising from the sale of said goods," the latter "agreeing to share one-third of the losses that might accrue from said sale of said goods, and to act as clerk in the sale of said goods" for the former—constitutes them partners *inter sese*. Scott *v.* Campbell, 30 Ala. 728.

Instances.—Where certain cattle were delivered to plaintiff and two others, to be kept for a time, and then to be sold by defendant, and, after deducting the first cost, defendant was to retain one-half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons—*Held*, no partnership, because there was no community of profit and loss, or of ownership in the subject of the contract. Beckwith *v.* Talbot, 2 Colo. 639.

Two firms in the wool trade agreed to furnish each a stated proportion of a quantity of wool to be sold to a certain vendee, and to share the profit and loss of the transaction. The contract to furnish the wool was made by one of the firms, and the other was not originally a party to it, but the contracting firm afterwards applied to the other firm for a part of the wool necessary to enable it to fill the contract which was furnished under

arises—What do they really mean? If they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agree-

the arrangement stated above. *Held*, that they were not partners *inter sese* in the transaction, and could not jointly sue the vendee for non-fulfillment of his contract. Snell *v.* De Land, 43 Ill. 323.

Agreements relating to vessels.—An agreement between the owner of a vessel and the captain that each should pay certain expenses, and divide the freight, with a power to the captain to invest it on joint account, constitutes a copartnership. Cox *v.* Delano, 3 Dev. (N. C.) L. 89.

An association of separate owners of several steamboats into a joint concern, to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid, is no more than a private copartnership. Each member of the association is responsible, individually, for his acts or contracts, in the business of the common concern. The Swallaw, Olc. (U. S.) 334.

Agreements relating to land or to crops.—Joint purchasers of land intended to be sold for joint profit, are partners. Hulett *v.* Fairbanks, 40 Ohio St. 233; Richards v. Grinnell, 63 Iowa 44; S. C., 50 Am. Rep. 727; Canada v. Barksdale, 76 Va. 890.

So, an agreement between two for the joint purchase of land for improvement and sale, where the money was advanced by one who was to be repaid principal and interest with two-thirds of the profits, the loss to be borne equally, makes them partners. Plunkett *v.* Dillon, 3 Del. Ch. 496.

A contract between the owner of land-warrants and a locator, to locate the warrants for a certain portion of the lands, each party to contribute a share of the expenses, does not create a partnership between them. M'Arthur v. Ladd, 5 Ohio 514.

Where two persons agree that one shall furnish land and stock and the other labor, both to share the expenses and the crop equally, they are, *inter sese*, partners. Holifield *v.* White, 52 Ga. 567. (Holloway *v.* Brinkley, 42 Ga. 226; and Smith *v.* Summerlin, 48 Ga. 425, distinguished.)

Mining contracts or adventures.—Two persons jointly interested in a mining adventure are partners; and this, whether they so agreed or not. Snyder *v.* Burnham, 77 Mo. 52.

A written agreement, by which defendant was to and did receive of plaintiff $250, with which to go to California to engage in gold-digging, for two years, during which time his earnings were to be divided with plaintiff—*Held* to make the return of the money advanced dependent upon the result of the adventure, and thus to constitute the parties joint adventurers, if not strictly partners. Brigham *v.* Dana, 29 Vt. 1.

Where two agree to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchase a mine, paying a note given in the firm name for a portion of the price—*Held*, that the contract is one of partnership, in the ordinary sense as distinguished from what is known as a "mining partnership," and that either partner has the same authority to bind the firm as if it were an ordinary trading partnership. Decker *v.* Howell, 42 Cal. 636. Compare Duryea *v.* Burt, 28 Cal. 569; Stapleton *v.* King, 33 Iowa 28.

Agreements for capital on the one side, and labor on the other.—Where two persons join together in an adventure in trade, one contributing a vessel and the other his skill, labor, experience, &c., and there is to be a communion of profits on a fixed ratio, the relation is a partnership.

ment. (*k*) But a clause negativing a partnership may throw light on other clauses and rebut inferences which might be drawn from them alone. In practical life such questions do not arise in any abstract form. Some definite dispute has to be determined, *e. g.*, liability to creditors *or the right of one party to the agreement to some particular thing or to some particular relief as to which the agreement itself is the true guide.[3]

*12]

2.—*Partnership is prima facie the result of an agreement to share profits, although nothing may be said about losses, and although there may be no common stock.*

Agreements to share profits only.—Except in cases specially provided for by statute, an agreement to share profits, nothing being said about losses, amounts *prima facie* to an agreement to share losses also; (*l*) for it is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their

Ward *v.* Thompson, 22 How. (U. S.) 330. S. P., Vandewater *v.* Mills, 19 Id. 82.

P. and L. agreed as follows: L. to furnish machinery to raise a sunken vessel, and P. the labor—the vessel, when raised, to be sold by L. for their joint account, L. to first refund to P. the sums paid by him for labor. *Held*, a partnership, both *inter sese* and as to outsiders. Lynch *v.* Thompson, 61 Miss. 354.

An agreement provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits; and then declared that after the payment of the capital thus invested, and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them. *Held*, that the agreement constituted a partnership. Beauregard *v.* Case, 91 U. S. 134.

(*k*) See Ex parte Delhasse, 7 Ch. D 511; Moore *v.* Davis, 11 Ch. D. 261. See, also, Pooley *v.* Driver, 5 Ch. D. 460.

3. **Partnership without intention.**—An agreement pursuant to which all the parties interested furnish specified proportions of the capital, jointly own the property purchased, which is to be sold for their joint and mutual benefit; each to contribute his skill and assistance, and share in specified proportions in the final profit or loss of the business, which are to be ascertained at the close thereof—will create a partnership, as between the parties themselves, although they may not have been aware that such was its legal effect. Duryea *v.* Whitcomb, 31 Vt. 395.

A joint undertaking and community of profit and loss in the results of the business will constitute a partnership, even where each partner retains the exclusive ownership of the separate property contributed by him to the use of the firm. McCrary *v.* Slaughter, 58 Ala. 230.

(*l*) Greenham *v.* Gray, 4 Ir. Com. L. Rep. 501; Dry *v.* Boswell, 1 Camp. 330; Heyhoe *v.* Burge, 9 C. B. 440, per Parke, B.

intention if they have said nothing to the contrary. (*m*) It follows from this that where no statute interferes, an agreement to share profits is *prima facie* an agreement for a partnership, and accordingly it has been held that unless an intention to the contrary can be shown persons engaged in any business or adventure and sharing the profits derived from it are partners as regards that business or adventure. (*n*)[4]

Community of profit as a test of partnership.—Indeed, it has often been said that community of profit is the test of partnership. (*o*) This, however, is not accurate. Whether persons are really partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to

(*m*) This *prima facie* inference was held to be excluded by the rules of the building societies which were considered in Brownlie *v.* Russell, 8 App. Cas. 235, and Tosh *v.* North British Build. Soc., 11 App. Cas. 489.

(*n*) See Pooley *v.* Driver, 5 Ch. D. 458.

4. Agreements to share profits—losses not mentioned.—Persons engaged in any trade, business or adventure, upon the terms of sharing the profits and losses arising therefrom, are partners in that trade, business or adventure. An agreement to share the net profits necessarily implies a sharing of the losses. Wilcox *v.* Dodge, 12 Ill. App. 517.

An agreement to share profits may, but does not necessarily, imply a joint interest in property held or used for the purposes of the business from which the profits are to arise. Howe *v.* Howe, 99 Mass. 71; Meserve *v.* Andrews, 104 Mass. 360.

Where all the parties had, by a contract entered into, a right to share in the profits of a business, and to use the capital invested, and an inchoate title to it, a partnership exists between them. Vassar *v.* Camp, 14 Barb. (N. Y.) 341.

A pool arrangement between the owners of different steamboats, whereby the excess of net earnings of one boat over the other is to be divided at the end of the season, does not, alone, constitute a partnership so as to create a joint liability for the negligence of either. Fay *v.* Davidson, 13 Minn. 523.

A, the owner of a zinc mine, agreed in writing with B to furnish him a certain quantity of ore per annum, for three years, for $10 per ton. B agreed to provide suitable buildings and machinery for converting the ore into paints, &c., and to divide with A the profits in the proportion of one-fourth to himself and the remainder to A; the cost of the buildings and machinery to be paid out of the profits after a specified time. *Held*, that this constituted a partnership between A and B. Wadsworth *v.* Manning, 4 Md. 59.

Where two persons having goods consigned to each one separately for sale on commission, entered into a copartnership for the purpose of receiving and selling goods on commission, and put the goods so consigned to each into a common stock, agreeing to share commissions jointly, they were held jointly liable as copartners for the proceeds of the separate consignments received subsequently to the agreement of copartnership, in the absence of satisfactory evidence that each transacted business separately in relation to his separate consignments. Dix *v.* Otis, 5 Pick. (Mass.) 38.

(*o*) Heyhoe *v.* Burge, 9 C. B. 446; Fox *v.* Clifton, 9 Bing. 115; Ex parte Langdale, 18 Ves. 300.

turn on one or two only of the clauses in it. (*p*) A good instance of this is afforded by the Irish case of Barklie *v.* Scott. (*q*) There a father paid a sum of money as his infant son's share of the capital of a partnership, and it was agreed *that during the son's minority the profits should be accounted for to the father; it [*13 was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement.[5]

Servants, &c., sharing profits.—Other illustrations of the same principle are afforded by those cases in which managers and clerks are paid salaries proportionate to the profits of the business in which they are employed. The act 28 and 29 Vict., c. 86, which will be noticed hereafter, expressly provides for such cases as these; but, independently of that act, no partnership subsists between persons thus paid and those who paid them, where it appears from the whole agreement that a partnership was not intended. (*r*) The observations on agreements to share profits and losses (*ante* p. *10) are applicable to agree-

(*p*) See *ante* p. *10, and the cases in the next note but one.

(*q*) 1 Huds. & Br. 83. Compare Reid's Case, 24 Beav. 318, where the father who had transferred shares into his infant son's name was held a contributory.

5. **Community of profits, how far the test.**—Although a partnership as to third persons may arise by mere operation of law, against the parties' intention, yet, as between the parties themselves, it only exists when such is their actual intention, and, of course, a mere participation of profits will not make the parties partners *inter sese*, unless such is their intention. Hazard *v.* Hazard, 1 Story (U. S.) 371.

Sharing profits is not always a test of partnership. The liability of one partner for the contracts of another is founded on the relation they sustain of each being principal and also agent as towards the other. Harvey *v.* Childs, 28 Ohio St. 319.

Thus, an agreement between two persons to share in the profits of an adventure or concern does not necessarily constitute them copartners in respect to the concern or adventure from which the profits arise. Rice *v.* Austin, 17 Mass. 197; Newman *v.* Bean, 21 N. H. (1 Fost.) 93; Lamb *v.* Grover, 47 Barb. (N. Y.) 317.

Two or more engaged in business, with no mutual interest in the capital invested, and no stipulation for mutual loss, are not, in all cases, copartners, though there be an agreement to share profits. Vanderburgh *v.* Hull, 20 Wend. (N. Y.) 70; Pattison *v.* Blanchard, 5 N. Y. 186; Fitch *v.* Hall, 25 Barb. (N. Y.) 13; Cummings *v.* Mills, 1 Daly (N.Y.) 520; Loury *v.* Brooks, 2 McCord (S. C.) 421.

Where the agreement for the partnership is in writing, its terms must be considered in connection with the participation in the profits, in determining whether the partnership relation has been established or not. Meehan *v.* Valentine, 29 Fed. Rep. 276.

(*r*) Ex parte Tennant, 6 Ch. D. 303 (where a father claimed to be a partner with his son); Ross *v.* Parkyns, 20 Eq. 331; Rawlinson *v.* Clarke, 15 M. & W. 292; Stocker *v.* Brocklebank, 3 Macn. & G. 250; Shaw *v.* Galt, 16 Ir. C. L. 397; Radcliffe *v.* Rushworth, 33 Beav. 484 (where there was a holding out and a deed executed by the alleged partners, in which they were

ments to share profits only, but with this difference, viz., that in the latter case it is easier than in the former to come to the conclusion that a partnership was not intended to be formed.

If the servant sharing profits has also an interest in the partnership capital or stock, this additional circumstance goes far to show that a partnership was, in fact, intended. (*s*)[6]

described as carrying on business together). See also, Geddes v. Wallace, 2 Bligh 270. In R. *v.* Macdonald, 7 Jur. (N. S.) 1127, a servant paid by a share of profits was convicted of embezzlement, which he could not then have been if he had been a partner. In Withington *v.* Herring, 3 Moo. & P. 30, an agent paid by a salary and a share in the profits was thought to be a partner, but the question was not decided.

(*s*) See Reid *v.* Hollinshead, 4 B. & C. 867; Ex parte Chuck, 8 Bing. 469; Gilpin *v.* Enderby, 5 B. & A. 954.

6. Clerks, servants, &c., sharing profits.—In Parker *v.* Canfield, 37 Conn. 250, it is said: "Participation in the profits of a business is strong presumptive evidence of a partnership in it. This rule and the reason apply as well to a party who receives a sum equal to a certain share of the profits of a business as to a party receiving such share of profits by the name of profits. There are cases, however, where money received may appropriately be regarded as a sum measured by profits rather than as profits themselves; but whether it shall be so regarded depends upon no arbitrary use of phrases, but upon the nature of the contract and the real consideration upon which the money is received. A share of profits paid to agents to secure exertion is not such a participation in profits as to make the agent liable as partner, and in such cases the money so paid is spoken of as a sum equal to or measured by profits, rather than as a share in the profits themselves."

The principle there laid down has been reiterated in a great number of cases, both earlier and later, where employees, whose compensation was based upon the profits of the business, either claimed the rights of partners, or were sought to be held liable as such by creditors; among others, see Shropshire *v.* Shepperd, 3 Ala. 733; Hodges *v.* Daws, 6 Ala. 215; Christian *v.* Crocker, 25 Ark. 327; Hanna *v.* Flint, 14 Cal. 73; Le Favre *v.* Cassagnio, 5 Colo. 564; Loomis *v.* Marshall, 12 Conn. 69; Pond *v.* Cummins, 50 Conn. 372; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Burton *v.* Goodspeed, 69 Ill. 237; Price *v.* Alexander, 2 Gr. (Iowa) 427; Reed *v.* Murphy, 2 Gr. (Iowa) 574; Holbrooke *v.* Oberne, 56 Iowa 324; Shepard *v.* Pratt, 16 Kan. 209; Taylor *v.* Sotolingo, 6 La. Ann. 154; Miller *v.* Chandler, 29 La. Ann. 88; Chaffraix *v.* Price, 29 La. Ann. 176; Kerr *v.* Potter, 6 Gill (Md.) 404; Bull *v.* Schubert, 2 Md. 38; Crawford *v.* Austin, 34 Md. 49; Sangston *v.* Hack, 52 Md. 173; Turner *v.* Bissell, 14 Pick. (Mass.) 192; Blanchard *v.* Coolidge, 22 Pick. (Mass.) 151; Bradley *v.* White, 10 Metc. (Mass.) 303; Meserve *v.* Andrews, 104 Mass. 360; Commonwealth *v.* Bennett, 118 Mass. 443; Hall *v.* Edson, 40 Mich. 651; Whitehall *v.* Shickle, 43 Mo. 538; Campbell *v.* Dent, 54 Mo. 325; Webb *v.* Leggett, 6 Mo. App. 345; Mason *v.* Hackett, 4 Nev. 420; Atherton *v.* Tilton, 44 N. H. 452; Smith *v.* Perry, 5 Dutch. (N. J.) 74; Voorhees *v.* Jones, 5 Dutch. (N. J.) 270; Metting *v.* Colt, 3 Halst. (N. J.) Eq. 539; Hodgman *v.* Smith, 13 Barb. (N. Y.) 302; Brockway *v.* Burnap, 16 Barb (N. Y.) 309; Clark *v.* Gilbert, 32 Barb. (N. Y.) 576; Burckle *v.* Eckhart, 1 Den. (N. Y.) 337; 3 N. Y.

Partnerships in profits only.—It is not, however, essential to the existence of a partnership that there shall be any joint capital or stock. If several persons labor together for the sake of gain, and of dividing that gain, they will not be partners the less on account of their

132; Smith *v.* Bodine, 74 N. Y. 30; Richardson *v.* Hewitt, 76 N. Y. 55; Merwin *v.* Playford, 3 Robt. (N. Y.) 702; Benedict *v.* Hettrick, 35 N. Y. Superior 405; Butler *v.* Finck, 10 N. Y. Week. Dig. 163; Miller *v.* Bartlett, 15 Serg. & R. (Pa.) 137; Dunham *v.* Rogers, 1 Pa. St. 255; Norwent *v.* Hull, 1 Humph. (Tenn.) 320; Bell *v.* Hare, 12 Heisk. (Tenn.) 615; Good *v.* McCartney, 10 Tex. 193; Cothran *v.* Marmaduke, 60 Tex. 370; Ambler *v.* Bradley, 6 Vt. 119; Morgan *v.* Stearns, 41 Vt. 405; Sodiker *v.* Applegate, 24 W. Va. 411; S. C., 49 Am. Rep. 252; Nicholaus *v.* Thielges, 50 Wis. 491.

Illustrations of the rule.—In applying this principle it has been held that the following agreements did not give rise to the partnership relation: An agreement by a laborer with a land-owner to work on the land for a certain proportion of the crop, the land-owner to furnish team, implements, &c. Gardenhire *v.* Smith, 39 Ark. 280. An agreement between a master and the owner of a vessel, that the latter should receive two-fifths of the net earnings of the vessel for her hire. Reynolds *v.* Toppan, 15 Mass. 370. An agreement between A and B, by which A was to supply B with stock to be manufactured into cloth, at his mill, on A's account, and B was to manufacture the stock into cloth, and to deliver the same to A, for a certain sum per yard; A also engaging that if B should fulfill his engagement above stated, to pay him one-third of the net profits of the business. Denny *v.* Cabot, 6 Metc. (Mass.) 82. A contract by which A agreed with B to manufacture certain articles for B from materials to be furnished by the latter, and B agreed to pay therefor such amount as should arise from the profits of the business, together with ten per cent. on the amount of sales of goods manufactured. Judson *v.* Adams, 8 Cush. (Mass.) 556. An agreement by which A is to furnish B a stock of goods, and pay B for selling them a sum equal to a certain part of the net profits, the goods to remain the exclusive property of A, and B to have no interest therein. Partridge *v.* Kingman, 130 Mass. 476. A contract between the former owner of a business and his successor, by which the former agrees to work for the latter for a salary equal to one-half the net profits of the business, each to pay one-half of the outstanding indebtedness. State *v.* Donnelly, 9 Mo. App. 519. An agreement by which an agent for the sale of land, employed A to assist him in effecting a sale, and agreed to pay him one-half his commission, if he procured a purchaser. Wass *v.* Atwater, 33 Minn. 83. An agreement between A and B, whereby A was to receive twenty per cent. net of all claims collected against the United States, and B fifty per cent. for collecting. Logie *v.* Black, 24 W. Va. 1.

So, also, seamen, employed in the whale fishery, are usually compensated by a certain proportion of the profits of the voyage, but they are not partners with the ship-owners, so that their creditors can attach the cargo of oil for their private debts. Rice *v.* Austin, 17 Mass. 206; Baxter *v.* Rodman, 3 Pick. (Mass.) 435; Holden *v.* French, 68 Me. 241. See, also, Coffin *v.* Jenkins, 3 Story (U. S.) 108. And a partnership relation between the master and mate of a vessel is not established by proof that the mate shipped for a share of the profits, unattended by other circumstances and without proof of what

laboring with their own tools. Thus, in Fromont *v.* Coupland, (*t*) two
*14] persons who horsed a coach and divided the profits *were held to be partners, although each found his own horses, and the other had no property in them.

So, in French *v.* Styring, (*u*) where two co-owners of a race-horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the court had no hesitation in admitting that they might have been partners in the profits, although not in the horse itself. (*x*)

The ordinary agreement between publishers and authors, to the effect that the author shall contribute the manuscript, and the publisher shall, in the first instance, defray the expenses of publication, and repay himself out of the proceeds of the sale of the work, and that then the profits shall be divided, furnishes another instance of a partnership confined to profits only. (*y*)

Again, it frequently happens that one person has property and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided. In such cases it may be difficult to say whether a partnership is or is not created. In Stocker *v.* Brocklebank, (*z*) it is clear that no partnership was intended and none was created; in the Irish case of Greenham *v.* Gray, (*a*) it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly,

that share was to be. The Crusader, 1 Ware (U. S.) 448. But a partner may be entitled to a salary, if it is so agreed. Stimpson *v.* Green, 13 Allen (Mass.) 326, 332. See Brigham *v.* Clark, 100 Mass. 430.

(*t*) 2 Bing. 170. See, too, Lovegrove *v.* Nelson, 3 M. & K. 1.

(*u*) 2 C. B. (N. S.) 357; noticed again *infra*, p. 18.

(*x*) See, also, Steel *v.* Lester, 3 C. P. D. 126. The *dictum* in Syers *v.* Syers, 1 App. Cas. 181, to the effect that a partnership in profits is a partnership in the assets by which they are made is by no means universally true. See *infra*, note (*b*).

(*y*) See Gardiner *v.* Childs, 8 C. & P. 345; Reade *v.* Bentley, 3 K. & J. 271, and 4 Id. 656; Wilson *v.* Whitehead, 10 M. & W. 503; Gale *v.* Leckie, 2 Stark. 107; Venables *v.* Wood, 3 Ross L. C. on Com. L. 529. This last case is an authority for the proposition that authors and publishers are not partners at all, and *qu.* whether this is not the correct doctrine?

(*z*) 3 Macn. & G. 250. The servant claimed a right to take an active part in the management of the business. So, in Walker *v.* Hirsch, 27 Ch. D. 460. In Pawsey *v.* Armstrong, 18 Ch. D. 698, the clerk shared losses as well as profits, but *qu.* whether he was entitled to all he got?

(*a*) 4 Ir. Com. L. Rep. 501. The real truth here seems to have been that the plaintiff intended to create a partnership, whilst the defendant did not.

although the *mills, and machinery, and buildings, by means of which the business was carried on, clearly belonged to one partner only. [*15

Other instances of partnership in profits, although there is no community of interest in the capital or stock producing them, will be noticed when the subject of partnership property is examined. (*b*)7

(*b*) In Meyer *v.* Sharpe, 5 Taunt. 74, the distinction between an interest in profits and an interest in the goods by the sale of which those profits were to be produced was held to be clear and manifest. See, too, Smith *v.* Watson, 2 B. & C. 401.

7. Sharing profits in return for property or capital supplied.—Where two agree that each shall furnish a horse to do certain work, one to do the work and the other to pay the expenses, and divide the earnings equally, this will constitute a partnership. Gillbank *v.* Stevenson, 31 Wis. 592.

So, also, the following contracts have been held to have that effect: An agreement pursuant to which three parties intrust the investment and management of a certain sum from a common fund in an enterprise to one of them, with a stipulation that they shall share equally in the profits after deducting the amount of the investment. Harris *v.* Hillegass, 5 Pac. C. L. J. 240. An agreement under which, in consideration that A furnished timber, capital, and all his time in the manufacture of shingles, he was to have interest, and two-thirds of the net profits, while B was to have one third. Wells *v.* Babcock, 56 Mich. 276. An agreement by A and his wife with B, to work on the latter's farm, all sharing jointly in the proceeds of the joint labor. Plummer *v.* Trost, 81 Mo. 425. An arrangement between A and B for buying and selling on their joint account, in the name of A and B, a certain quantity of pork, by which A was to furnish whatever money should be necessary in the business, aside from such advances as might be procured on said pork, and B was to attend personally to the purchase and shipment, and out of the proceeds of the sale, after deducting the costs, expenses and disbursements of every kind, A was to be reimbursed the amount advanced by him, with interest, and the residue, being the net profits, was to be equally divided between them. Miller *v.* Price, 20 Wis. 117.

While the following agreements were held not to give rise to the partnership relation: A writing: "Received of G. $2000, to invest in wool, said G. to receive two-thirds of the net profits on the sale of the wool, and O. one-third. (Signed) O." Ruddick *v.* Otis, 33 Iowa 402. A contract whereunder a manufacturer is supplied with stock and materials which are to continue the property of the capitalist by whom they are furnished, although it is stipulated that the party who carries on the business shall ultimately receive any surplus which may remain after reimbursing their cost to the party furnishing them, with interest or a percentage of profit by way of compensation for his capital. Emmons *v.* Westfield Bank, 97 Mass. 230. An agreement by which defendant was to furnish the buildings, machinery, power and capital, and plaintiff was to perform the labor necessary for manufacturing raw material of a certain kind, which could be purchased at a certain place by plaintiff, at a price not exceeding the ruling market price at a certain other place; that such contract should terminate at a specified time; that defendant should make all sales of the manufactured article, and collect the pay therefor; and that he should pay to plain-

3.—*Partnership is prima facie the result of an agreement to share profits, although community of loss is stipulated against.*

Sharing profits, but not losses.—Persons who agree to share the profits of an adventure in which they engage are *prima facie* part-

tiff, as compensation for his services, a certain proportion of the net profits which should be realized. Boyce *v.* Brady, 61 Ind. 432. An arrangement between two persons, whereby one delivers to the other certain hay, which the latter agrees to transport to another market, and there sell the same, if he can, at not less than a given price per ton, of which he is to receive a specified sum per ton for his freight and trouble, and to pay over the balance to the other party; and if he sells at a higher price than the minimum price named, the excess is to be divided equally between them; and if he fails to make sale he is to store the hay for the other party, and to wait for his freight till the hay is sold. Morrison *v.* Cole, 30 Mich. 102.

So, also, where one party was to furnish money and the other was to buy cattle with it for the market, and the party furnishing the money was to have his capital returned, with five per cent. interest thereon, together with one-half the profits on the sale of the cattle, the parties were held not partners, as the one furnishing the money was exposed to no hazard of loss. Adams *v.* Funk, 53 Ill. 219.

Taking profits in lieu of rent.—In New Jersey, an agreement by a landlord with his tenant to take a share of the profits of the demised premises, by way of rent, does not constitute a partnership between them, so as to prevent an action at law by the landlord against the tenant for the rent. Perrine *v.* Hankinson, 11 N. J. L. (6 Halst.) 181. So, also, in Tennessee, one hiring or renting property—a still, tubs, &c., in this case—may contract for speculative compensation; and this will not constitute him a partner. England *v.* England, 57 Tenn. 108. And in North Carolina, it is expressly provided by statute that landlord and tenant shall not be regarded as partners because of an agreement under which the landlord is to receive a share of the crop. Where, therefore, the landlord furnishes the land and teams, and the tenant the laborers and provisions for them, the gross product to be divided without any account of expenditures made by either—*Held*, that an agricultural partnership is not created. Day *v.* Stevens, 88 N. C. 83; S. C., 43 Am. Rep. 732.

The following agreements between landlord and tenant have been held not to render the parties to them partners: An agreement to manage a farm furnished by another, and to share the crops. Tayloe *v.* Bush, 75 Ala. 432. An agreement by which the owner of land employs a cropper to cultivate it on shares, the owner reserving possession of the crop until his advances to the cropper shall be repaid. Gurr *v.* Martin, 73 Ga. 528. A contract that the lessor of a hotel should receive one-tenth of the gross receipts for rent. McDonnell *v.* Battle House Co., 67 Ala. 90; S. C., 42 Am. Rep. 99. An arrangement under which one "hires the use" of another's building from day to day, and keeps it as a hotel, paying the owner daily a sum "equal to one-third of the gross receipts and gross earnings." Beecher *v.* Bush, 45 Mich. 188; S. C., 40 Am. Rep. 465. Renting a saloon for half the profits of the business. Thayer *v.* Augustine, 55 Mich. 187; S. C., 54 Am. Rep. 361.

On the other hand, the parties to the following contracts were held to be partners:

ners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe. (*c*)

Stipulations against community of loss.—The inference that where there is community of profit there is a partnership is so strong that even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In Coope *v.* Eyre, (*d*) Lord Loughborough is reported to have said: "In order to constitute a partnership, communion of profits and loss is essential." But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity. (*e*)[8]

Contracts of loan compared with contracts of partnership without community of loss.—The true effect of such a complex agreement would, it is apprehended, be to entitle each of the partners to a share

A contract by which T. and wife deliver a stock farm to L., for a term of years, to improve; L. to have one-third of the profits, and to pay no rent; to carry on the farm as he pleases; the current expenses to be paid by the concern, and six per cent. interest to be allowed on advances by either party. Tibbatts *v.* Tibbatts, 6 McLean (U. S.) 80. An agreement under which A was to furnish land and an outfit, while B was to hire laborers and superintend the farm during the year; A also agreeing to provide money to carry on the business, half of which was to be repaid to him, and the profits to be divided between them. Reynolds *v.* Pool, 84 N. C. 37; S. C., 37 Am. Rep. 607. And in Georgia it is held that an agreement between two parties to carry on a particular business, in which real estate belonging to one of them is to be used, will be deemed to constitute a partnership, if the owner of the real estate is to be compensated for its use by a percentage of the profits of the business. And it is immaterial that in the written contract between the parties such compensation is described as rent. Dalton City Co. *v.* Dalton Manuf. Co., 33 Ga. 243.

(*c*) Brown *v.* Tapscott, 6 M. & W. 119.

(*d*) 1 H. Bl. 48.

(*e*) See Bond *v.* Pittard, 3 M. & W. 357; Geddes *v.* Wallace, 2 Bligh 270.

8. Stipulations against community of loss.—It has been held that while the perception of profits renders one liable as a partner to third persons, the partners may stipulate, as between themselves, that one of them shall not be liable for the debts of the firm. Pollard *v.* Stanton, 7 Ala. 761. Such a stipulation is valid as between the partners. Consolidated Bank *v.* State, 5 La. Ann. 44. Other cases, however, some of them quite recent, hold otherwise; thus, where an agreement was made between several persons that each would, upon his own account and with his own funds, conduct a store; that each was to bear his own *loss*, but whatever *profit* was made by either should be equally divided among all, it was held not to be a partnership either *inter sese* or as to outsiders knowing the character of the connection. Jordan *v.* Wilkins, 3 Wash. (U. S.) 110. S. P., Mayrant *v.* Marston, 67 Ala. 453. And see, also, Gill *v.* Ferris, 82 Mo. 156, where a recipient of one-third of the profits, and who was not bound by any of the losses, was held not to be a partner.

of the excess of the returns over the advances, while some of the partners would be entitled to be indemnified by the others for all losses *beyond the advances.* If this were not the result of the agreement, and if the persons indemnified were indemnified not only *16] against losses beyond the advances, but also *against the loss of the advances themselves, the contract would lose its character of a contract of partnership, and become a contract of loan. (*f*) [9]

(*f*) See Pothier, Contrat de Société, §§ 21, 22. Compare Pooley *v.* Driver, 5 Ch. D. 458, noticed *infra*, § 2.

9. **Lender to the firm, when deemed a partner.**—The distinction stated by the learned author may be illustrated by reference to the following decisions:

In Newbrau *v.* Snieder, 1 W. Va. 153, A gave money to B to enable the latter to purchase sheep, with the understanding that he was to have half the profits, but to have no interest on his money if there were losses, A declaring to a witness that he and B were partners. It was held that the transaction did not constitute a loan, but that the parties were partners as to the whole subject in controversy.

In Leggett *v.* Hyde, 58 N. Y. 272, H loaned to the firm of P & Co. $2000, to be used in the business for one year, under an agreement that he was to receive one-third of the profits, which were to be settled half-yearly, and at the end of the year, if he did not conclude to become a partner, he was to be repaid his $2000 out of the concern. It was held that the money so invested was used by the firm for the benefit of H; that he had an interest in the profits as such, not as a measure of compensation, but as a result of the capital and industry; and that as to the creditors of the firm, he was a partner, and jointly liable with the others for the partnership debts.

On the other hand, in Gollop *v.* Newman, 7 Pick. (Mass.) 282, where one advanced money to the owners of a vessel and cargo, on their promise to pay him a share of the proceeds of the voyage in proportion to the sum advanced, he was held to have no property in the cargo by virtue of the contract, either as a partner or tenant in common.

The following agreements, also, were held not to constitute the parties to them partners:

An agreement by A to furnish money to B to conduct business, and B to let A have goods at cost. Slade *v.* Paschal, 67 Ga. 541.

An agreement between manufacturers and a banker, whereby the latter was to furnish the former money wherewith to manufacture as many articles as they might think safe and profitable, they to return to him, in any event, his advances, and if the adventure proved profitable, one-third of the profits in lieu of interest on the money loaned; but no provision was made for his bearing any expense or loss, nor any time fixed for the termination of the adventure. Lintner *v.* Millikin, 47 Ill. 178.

An agreement under seal, that A will lend B a certain sum of money for a year, and endorse B's note for a further sum if A shall think that the business requires the use of such further sum, A to receive, by way of compensation, ten per cent. of the profits of the business, and in addition, two per cent. for each additional $1000, but A to have the right at all times to inspect the accounts. Boston & Colorado Smelting Co. *v.* Smith, 13 R. I. 27; S. C., 43 Am. Rep. 3. See, also, Culley v. Edwards, 44 Ark. 423; S. C., 51 Am. Rep. 614.

Usurious loans confounded with partnerships.—Whilst the laws against usury were in force, a tendency was sometimes manifested to treat what was in truth a loan at usurious interest and therefore illegal, as a contract of partnership and therefore legal. (*g*) This view of the transaction had the merit of apparently holding the parties to their bargain; but in truth the bargain to which they were held was very different from that which they themselves had contemplated; and by treating such transactions as partnerships, and not as loans, an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove. The leading cases on this subject are Gilpin *v.* Enderby (*h*) and Fereday *v.* Hordern. (*i*) They decided that a loan of money on the terms that the lender should share the profits of the borrower rendered the lender liable to third persons, as if he were a partner with the borrower; and that by reason of such risk the loan was not usurious. The judgments in these cases show that the borrower and lender were regarded by the court as partners *inter se*.

These cases, however, cannot now be relied upon; for, as will be seen hereafter, the mere fact that a lender of money shares profits with the borrower will not make the lender liable as a partner; and as between the borrower and the lender the question of partnership or no partnership turns on the real agreement between them. (*k*)[10]

Dormant partners.—At the same time, even now a person who is really a partner, although dormant (*i. e.*, a partner taking no part in the management of the partnership), will be treated as such, although

(*g*) See Bloxham *v.* Pell, cited 2 Wm. Bl. 999; and compare Morse *v.* Wilson, 4 T. R. 353, and 7 Byth. Conv. (2d ed.) 163.

(*h*) 5 B. & A. 954.

(*i*) Jac 144; see, also, Ex parte Briggs and Ex parte Notley, 3 D. & Ch. 367.

(*k*) See the cases of servants sharing profits, *ante* pp. 12, 13.

10. **Usurious loans.**—In a recent case decided in the United States Circuit Court for the Eastern District of Pennsylvania, a written contract by which a firm agreed, in consideration of $10,000 loaned by a third person, to pay one year from date, to such third person, one-tenth of the firm's net profits over and above $10,000, but, if the firm's net profits did not exceed $10,000, then to merely pay interest on the sum loaned, was construed to be merely a contingent promise to pay more than usual interest, and not to constitute such third person a partner in the firm. Meehan *v.* Valentine, 29 Fed. Rep. 276.

So, also, in Lord *v.* Proctor, 7 Phil. (Pa.) 630, a loan made for two years, with interest payable quarterly, at a rate above six per cent., and to be made equal to one-fourth of the profits of the borrower's business at the end of the term, was held not to constitute the lender a partner with the borrower.

he may have endeavored to conceal his true character under the cloak of being a mere lender of money.(*l*) Whether a person *advancing money and sharing profits is a creditor or a dormant partner is often a very difficult matter to determine, and can only be decided by a careful study of the whole agreement between the borrower and the lender, and especially by examining what rights are conferred on or taken from the person making the advance. The right of a lender is to be repaid his money with such interest or share of profits as he may have stipulated for; and his right to a share of profits involves a right to an account and to see the books of the borrower, unless such right is expressly excluded by agreement. If, however, a lender stipulates for more than this (*e. g.*, for a right to control the business or the employment of the assets, or to wind up the business), or if his advance is risked in the business, or forms part of his capital in it, he ceases to be a mere lender and becomes in effect a dormant partner. In illustration of these remarks, reference may be made to Mollwo, March & Co. *v.* Court of Wards (*m*) on the one hand, and Pooley *v.* Driver (*n*) on the other.(*o*) In both there was an advance of money and a stipulation for a share of profits; and in both the lender had unusual powers; but in the former case the court came to the conclusion that a loan on security was all that was really intended; whilst in the latter the court considered that the lender was really a dormant partner, although he had done his best to avoid the liabilities incident to that position.[11] [*17

(*l*) See Pooley *v.* Driver, 5 Ch. D 458, noticed *infra*, § 2.

(*m*) L. R., 4 P. C. 419.

(*n*) 5 Ch. D. 458.

(*o*) They are referred to more at length hereafter, in section 2.

11. Definition of "dormant partner."—In one case it is held that a dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as "company," "sons," &c. (Jones *v.* Fegely, 4 Phil. (Pa.) 1; see, also, Waite *v.* Dodge, 34 Vt. 181), while in another it is said that a partner is not to be deemed dormant because his name does not appear in the firm style, nor is it necessary to constitute one a dormant partner that his membership be universally unknown. It is sufficient if he is not an ostensible partner. Metcalf *v.* Officer, 2 Fed. Rep. 640.

"Secret partnership" means, in common usage, where the existence of certain persons as partners is not made known to the public by any of the partners, in contradistinction to open or notorious partnership. Where one partner publicly avows all the partners so that they become and are known as such, and credit is obtained thereby, it is no longer a secret partnership, whether the firm be carried on in the name of one partner only, or otherwise. United States Bank *v.* Binney, 5 Mason (U. S.) 176.

Liability of dormant or secret partner.—Such a partner is liable for all the

4.—*Partnership is not the result of an agreement to share gross returns.*

Sharing gross returns.—Although, as has been already pointed out, those who share gross returns share profits, if any there be, for gross returns include profits, and although at common law an agreement to share profits is *prima facie* an agreement for a partnership, yet it has long been held that a partnership is not the result of an agreement to share gross returns. (*p*)

If several persons make advances for a common object and agree to share the gross returns in proportion to their advances, *this *18] does not create such a community of interest in profit or loss as to make such persons partners. Thus, in Gibson *v.* Lupton, (*q*) where two persons joined in the purchase of wheat with the intention of paying for it and dividing it equally, it was held that they were not partners. So, if two workmen agree to divide their wages, that, *per se*, does not make them partners. (*r*)

Co-owners sharing gross returns.—But the strongest illustrations of this doctrine are afforded by those cases in which co-owners of chattels divide the earnings of the chattel. The distinction between co-owners and copartners will be noticed hereafter, but as an instance in which co-owners have been held not to be partners, although they agreed to divide the returns obtained by the use or employment of the thing owned, reference may be made to French *v.* Styring. (*s*) There the plaintiff and defendant were entitled in common to a race-horse. It

firm debts contracted during his connections with it. Lea *v.* Guice, 21 Miss. 656; Lindsey *v.* Edmiston, 25 Ill. 359; Bigelow *v.* Elliott, 1 Cliff. (U. S.) 28. He is liable on a firm note, independent of any charge or proof of a fraudulent collusion between the partners to conceal his liability. Bradshaw *v.* Apperson, 36 Tex. 133; St. Armand *v.* Long, 25 La. Ann. 167. If he was interested in some only of the transactions of the concern, he is responsible for a transaction at which he is shown to have been present, and in which he participated. Lindsey *v.* Edmiston, *supra*.

In Parker *v.* Canfield, 37 Conn. 250, the rule is laid down that one who receives profits in consideration of furnishing capital is clearly a partner; and is such as to third persons, even though it be stipulated that the capital so furnished should be regarded as a loan, and the party furnishing it a mere creditor.

As to who will be deemed a dormant partner as towards creditors of the firm, see, also, Gilmore *v* Merritt, 62 Ind. 525.

(*p*) See the preliminary remarks, *ante* pp. *8, *9.

(*q*) 9 Bing. 297. See further, as to joint purchasers, Cooper *v.* Eyre, 1 H. Bl. 37; and Hoare *v.* Dawes, 1 Doug. 371, and *post* § 6.

(*r*) See Finckle *v.* Stacey, Sel. Cas. in Ch. 9.

(*s*) 2 C. B. (N. S.) 357.

was agreed that the plaintiff should keep, train, and have the management of the horse, that thirty-five shillings a week should be allowed for the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, and that one-half of the horse's keep and other expenses, and his winnings, should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided amongst them equally. (*t*)

So, where two persons were respectively lessee and manager of a theatre, and they shared the gross receipts equally, the manager paying the expenses out of his share, it was held that no partnership subsisted between them. (*u*)[12]

(*t*) See the judgment of Willes, J., 2 C. B. (N. S.) 366.

(*u*) Lyon *v.* Knowles, 3 B. & S. 556.

12. **Sharing gross returns does not constitute partnership.**—The weight of authority in this country is in harmony with the principles laid down in the text, as will be seen by reference to the decisions collated below, in each of which the existence of the partnership relation was held not to exist:

Where an agreement was made between two that one should furnish a farm with a certain amount of teams and labor, and the other manage the farm and give certain labor, the crops to be divided between them. Blue *v.* Leathers, 15 Ill. 31. S. P., Moore *v.* Smith, 19. Ala. 774.

Where A and B, attorneys, agreed to do L's law business free from charge, except for board and traveling expenses outside the county, and L agreed to get and turn in to A and B all law business that he could control, fees to be divided two-thirds to A and B, one-third to L. Heshion *v.* Julian, 82 Ind. 576.

Where two agree, the one to furnish a brick-yard, equipped for work, and the other to supply materials and labor for making bricks, the same to be divided between them when made, without making any agreement to share profits and losses. La Mont *v.* Fullam, 133 Mass. 583. S. P., Clark *v.* Smith, 52 Vt. 529; Flint *v.* Eureka Marble Co., 53 Vt. 669.

Where one was to furnish a circular saw mill, and men and horses to work it, and another to furnish the logs, and feed for the hands and horses, the lumber to be equally divided between them. Stoallings *v.* Baker, 15 Mo. 481.

Where two firms agree to share commissions on sales of goods forwarded by one to the other. Pomeroy *v.* Sigerson, 22 Mo. 177.

Where grain, received at a mill as toll, was mixed up, and became the subject of traffic between the parties, each being part owner, and interested in the proceeds of the sale. Benson *v.* M'Bee, 2 McMull. (S. C.) 91.

Where one party furnished a boat, and the other sailed it, under an agreement to divide the gross earnings. Bowman *v.* Bailey, 10 Vt. 170.

Where a contractor for carrying the

Wages payable by a share of produce.—Again, in whaling voyages the sailors are usually paid a *certain proportion of the produce of the oil obtained, but even before the act of 28 and 29 [*19 Vict., c. 86, they were not therefore partners, either with each other or with their employers. (*x*) In such cases as this, partnership was clearly not intended; and even when persons who shared profits were held to incur liabilities as if they were partners, it was held that persons who merely divided gross returns did not incur any such liabilities. (*y*) *A fortiori* it was impossible to regard them as partners *inter se*. The act of 28 and 29 Vict., c. 86, which will be noticed hereafter, renders this even clearer than before.[13]

5.—*Partnership is not the result of an agreement which is not concluded.*

Unconcluded agreements.—In order that partnership may result from any agreement, it is necessary that the parties to the agreement shall have mutually assented to the same propositions; otherwise there is no contract at all, but merely a treaty from which each party is at liberty to retire. If, therefore, A proposes to B that a partnership shall be formed between them on certain terms, and B either does not accept the proposal or accepts it on other terms than those offered, A and B are not yet agreed and no partnership subsists between them. Nor is B bound by his qualified acceptance; for that is merely a counter offer on his part which he is at liberty to retract until A has assented to all its terms without qualification.

mail agreed with a subcontractor that he should perform one-half the service, and be entitled to one-half the compensation. Wilkinson *v.* Jett, 7 Leigh (Va.) 115.

There are decisions, however, that hold the contrary doctrine, viz.: that sharing in the gross proceeds of a business creates the partnership relation. Fail *v.* McKee, 36 Ala. 61; Musier *v.* Trumpbour, 5 Wend. (N. Y.) 275; Ludlow *v.* Cooper, 4 Ohio St. 1. See, also, Mr. Parsons' remarks on this subject, and his very interesting note upon it. Pars. on Part. *88, and note *q*.

(*x*) Mair *v.* Glennie, 4 M. & S. 240; Wilkinson *v.* Frazier, 4 Esp. 182; and see Parrott *v.* Bryant, 2 Y. & C. Ex. 61. See, also, Stavers *v.* Curling, 3 Bing. N. C. 355, where the captain was to be paid a sum equal to twelve per cent. on the net proceeds, after deducting certain expenses. He brought an action for what was due to him, and recovered, but no question of partnership arose. Some of the customs established amongst whalers will be found in Fennings *v.* Grenville, 1 Taunt. 241, where it was held that one of two tenants in common of a whale could not maintain trover against his cotenant for half of the blubber, &c., yielded by the whale.

(*y*) *Post* § 2.

13. For cases relating to the lay or share of seamen in the proceeds of a voyage, see *supra*, p. *13, note 6.

There are many decisions illustrating these principles, but they relate more particularly to agreements to take shares in companies, and it is unnecessary to consider them here. (z)

*20] *Cases in which there is no contract, because there has never been a mutual assent to the same terms, must not be confounded with cases in which a valid contract has been entered into, but which, being conditional, and not having been performed on the one part, is not binding on the other. These will be considered hereafter. [14]

6.—*Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues.*

Contemplated partnerships.—It is important to distinguish between actual and contemplated partnerships. Persons who are only contem-

(z) See the next page. In McClean *v.* Kennard, 9 Ch. 336, an agreement to become partners with executors was held to create a partnership with those only who proved.

14. **Unconcluded agreements.** — As between the partners themselves, the ultimate facts whence a partnership is deduced are, first, the agreement, and, second, its execution; there can be no partnership between parties, so far as they solely are concerned, without a consent thereto and fulfillment thereof. Grooves *v.* Tollman, 8 Nev. 178.

Inter sese, a partnership can commence only by the voluntary contract of the parties; and when once formed, no third person can be afterwards introduced into the firm as a partner without the concurrence of all the parties who compose the original firm. Freeman *v.* Bloomfield, 43 Mo. 391. Therefore, where one buys a stranded vessel, and agrees to give another an interest therein, the latter has no interest he can transfer without the former's consent. It is an agreement to take in a partner, and gives the second party no right to impose an unknown partner on the first. Taylor *v.* Penny, 5 La. Ann. 7. So, also, an advance of money to one engaged in business, and which was used by him for the purchase of goods, does not create a partnership, although made in anticipation of a future partnership, which is never consummated. Hubbell *v.* Woolf, 15 Ind. 204. Accordingly, where A advanced money to B, to be used in his business, taking his notes therefor, under an agreement that A might become an equal partner with B, considering the sums advanced as contributions to the capital of the firm, if on further examination A should so desire, and B carried on the business as his own, drawing more than half the profits therefrom, and crediting A on the books with interest on the notes, and A, seeing the interest credited, claimed that he was a partner, and should receive half the profits, but no interest, and B still continued to credit A with interest, and to treat the business as entirely his own—in a suit on the notes, it was held, in Massachusetts, that no partnership was ever formed. Morrill *v.* Spurr, 9 N. E. Rep. 580.

plating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon.(*a*) It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues; for if there is, the parties will not be partners until such time has elapsed or act has been performed. (*b*)

The general principle that so long as an agreement to form a partnership is executory no partnership is formed, applies as well to ordinary partnerships as to projected companies, and it will be useful to consider it with reference to each in turn.[15]

(*a*) Per Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 141, 142.

(*b*) See, in addition to the cases cited below, Drennen *v.* London Ass. Co., 6 Davis Sup. Ct. Rep. 25; Osborne *v.* Jullion, 3 Drew. 596, where the partnership (?) depended on the result of experiments.

15. Contemplated partnerships; executory agreements.—While a valid partnership may be contracted, to take effect at a future time, or on the happening of a certain event, or the performance of certain conditions (Avery *v.* Lauve, 1 La. Ann. 457), yet, usually, the event must take place or the conditions be performed before the firm obtains a legal existence. Thus, proof of an agreement between two partners that upon the death of one of them his brother should become a partner in the firm, and be entitled to a share of the profits, is not sufficient to establish a partnership. Brink *v.* New Amsterdam Fire Ins. Co., 5 Robt. (N. Y.) 104. So, also, where by an agreement between the owners of a steamboat and a third person, the latter was to run the boat, and the proceeds were to be applied, first, to the expenses of the boat; second, to the insurance; third, in a certain sum to the owners; and, lastly, the surplus to be divided among the parties—it was held that the partnership was not to commence until the first three claims were satisfied; and that until then the third party was merely the bailee of the boat. Ward *v.* Thompson, Newb. (U. S.) Adm. 95. See also, Haile *v.* York, 27 Wis. 209.

But the condition upon which the relation depends must be a precedent one to have this effect; if subsequent, its nonfulfillment will not annul the partnership contract. Murray *v.* Johnson, 1 Head (Tenn.) 353. Thus, where a firm takes in a new partner, by a written instrument signed by the old members and the new, which recites the payment of a certain sum by the incoming partner, and conveys to him one-third interest in the assets, and consents that he shall have a third interest in the profits, the new partnership is complete on the execution of the instrument, notwithstanding it may be agreed that an account of the stock shall be taken, and if it exceeds a certain sum, the new partner shall pay one-half of that sum. Phillips *v.* Nash, 47 Ga. 218. And it may be said that the existence of a partnership does not depend upon the fact that each partner has in all things

(a) Application of the principle to ordinary partnerships.

Option to become a partner.—It is not unusual for a person who contemplates joining another in business to agree that such business shall be carried on upon certain terms not themselves creating a partnership, *and to stipulate for an option to become a partner either at a specified time, or at any time the person having the option may choose. Such agreements, if *bona fide*, and not mere colorable schemes for creating a partnership, and at the same time concealing it, (*c*) do not create a partnership until the person having the option has exercised it, and elected to become a partner.[16] [*21

complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved. Hartman *v.* Woehr, 3 C. E. Gr. (N. J.) 383.

Still, there must be nothing inchoate about the partnership, or it will not be liable to creditors; it must become complete before it has a legal existence even as to third persons. Irwin *v.* Bidwell, 72 Pa. St. 244.

To impose such a liability there must be, in addition to the agreement to share profits and losses, an entering upon some business thereunder. Lucas *v.* Cole, 57 Mo. 143.

In other words, the partnership agreement must not be an executory contract. Thus, a mere promise to "go halves" in a purchase of land, if not carried into effect, does not make the promisor a partner, so as to bind him to pay a note executed by the grantee in both of their names, for improvements thereon. Huckabee *v.* Nelson, 54 Ala. 12. And an advance of money to one engaged in business, and which is used by him for the purchase of goods, does not create a partnership, although it may be made in anticipation of a future partnership, which is never consummated. Hubbell *v.* Woolf, 15 Ind. 204. For further illustrations of this principle, see Reboul *v.* Chalker, 27 Conn. 114; Haskins *v.* Burr, 106 Mass. 48; Strong *v.* Place, 4 Robt. (N. Y.) 385.

Where, however, it is clear from the articles that the parties contemplate an immediate commencement of business as a firm, the failure of one of them to pay in his part of the capital, as agreed, does not render him any the less a partner as of the date of the execution of the articles. Southern White Lead Co. *v.* Haas, 33 N. W. Rep. 657. S. P., Grady *v.* Robinson, 28 Ala. 289. See, also, Aspinwall *v.* Williams, 1 Ohio 84; Austin *v.* Williams, 2 Id. 64; Crary *v.* Williams, 2 Id. 65.

(*c*) See Courtenay *v.* Wagstaff, 16 C. B. (N. S.) 110.

16. Option to become a partner.—Where a proposed partnership, evidenced by a letter, contemplates in its terms but one transaction, at the conclusion of which the profits are to be divided, and the letter making the offer sets a limit on the quantity of stock to be purchased, prescribes that it be bought on a joint credit, and requires that when purchased it shall be sent by particular persons to be sold in a particular market, under the supervision of the party making the offer, and the party receiving the letter so acts as to fulfill none of the requirements contained in it, there is no partnership, and in the event of loss, the party receiving the offer cannot maintain a bill for an accounting as partners and contribution. Metcalf *v.* Redman, 43 Ill. 264.

Where A contracted with a company to assume control of its affairs when satisfied

A strong illustration of this is afforded by Ex parte Davis, (*d*) where a creditor had a right to nominate himself as a partner with his debtor but had not exercised the right.

Again, in Gabriel *v.* Evill, (*e*) it was agreed between the defendant and two others that the defendant should enter into partnership with them, and bring in £1000 in cash and £1000 in goods, and that the partnership should date retrospectively from the 1st of January; but the defendant reserved to himself the option of determining at any time within twelve months from that day whether he would become a partner or not. The defendant advanced the £2000, and several other acts were done in execution of the agreement; but within the twelve months the defendant declared his option not to become a partner, and it was held that he never did in fact become one, and that he had not incurred any liability as if he had. (*f*)

In Price *v.* Groom, (*g*) a debtor's business was carried on by him under an inspectorship deed, which authorized the trustees to carry on the business themselves, and to take the profits, if they chose. Their interest in the profits, however, did not commence until the debtor's interest determined; and it was held that whilst he carried on the business there was no part*nership between him and them, they and he not being entitled to the profits at the same time.

*22]

Share not yet taken.—In Howell *v.* Brodie, (*h*) the defendant, intending to become a partner in a scheme for making and letting out a market place, advanced considerable sums of money, and ultimately, on the completion of the market, took one-seventh share in it. It was sought to make him liable for the expense of erecting the market, on

that its business was profitable, and to advance money to enable the company to fill its orders, that it might be ascertained if the business was profitable, A to retain from the proceeds of the orders the money advanced and part of the profits, it was held that A did not become a partner upon the execution of the contract. Cassidy *v.* Hall, 97 N. Y. 159.

(*d*) 4 De G., J. & Sm. 523. The agreement was in the form of a bond, and was, as Lord Westbury remarked, "an ingenious piece of mechanism." Such an agreement, however, cannot be relied upon as affording protection against third parties.

(*e*) 9 M. & W. 297, and Car. & Marsh. 358. See, too, Ex parte Turquand, 2 M., D. & D. 339, which turned on the same agreement. See, also, Re Hall, 15 Ir. Ch. 287, a similar case.

(*f*) Compare this case with Jefferys *v.* Smith, 3 Russ. 158. There A agreed to purchase B's share in a firm; A acted and was treated as a partner by the other members, but afterwards rescinded the contract with B; it was held that a partnership nevertheless subsisted between A and B's copartners.

(*g*) 2 Ex. 542.

(*h*) 6 Bing N. C. 44.

the ground that he was a partner with those by whom the plaintiff had been employed; but the court held that there was no partnership between them and the defendant until the share was taken by him.

Share of profits expected in lieu of salary.—In Burnell *v.* Hunt, (*i*) an agreement was come to between A and B that A should take premises and purchase machinery and materials to carry on the business of a silk lace-maker, and that B should manage the business and receive half the profits as soon as any accrued, and should, in the meantime, be paid £2 a week. It was held that so long as the £2 per week continued payable, there was no partnership. (*k*) [17]

Partnership articles to be drawn up.—Persons who agree to become partners may be partners although they contemplate signing a formal partnership deed and never sign it. (*l*) But if they are not to be partners until they sign formal articles of partnership, and if they do not so act as to waive the performance of such condition, they will not be partners until it has been performed. Where, however, two persons agreed to become partners from a subsequent day, upon certain terms to be embodied in a deed to be executed on that day, it was held that the partnership began on the day mentioned, although the deed was not executed until afterwards, and although alterations were made in it immediately before its execution. (*m*) In this case, however, the *parties did in fact commence business as partners on the day named, and it was wholly immaterial (as regarded the question before the court) what the terms of the partnership were. [*23

(*b*) *Application of the principle to promoters of companies.*

Promoters of companies not partners.—Promoters of companies are not partners; they are, it is true, engaged in a common object, and that object is ultimately to share profits; but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after the company is formed. It

(*i*) 5 Jur. 650, Q. B. The real point here was whether B had any interest in the *goods*, which he clearly had not, and would not have had even if there had been profits to divide.

(*k*) See, too, Ex parte Hickin, 3 De G. & S. 662.

17. See Re Blumenthal, 18 Bankr. Reg. 555; and *supra*, p. *13, note 6.

(*l*) As in Syers *v.* Syers, 1 App. Cas. 174.

(*m*) Battley *v.* Lewis, 1 Man. & Gr. 155; and see Wilson *v.* Lewis, 2 Id. 197. Compare Ellis *v.* Ward, 21 W. R. 100, where the intended partners quarrelled before they signed the deed.

was indeed said, in Holmes *v.* Higgins, (*n*) that the projectors of a railway were partners, they being associated for the purpose of procuring the act of parliament necessary to form the company and subscribing money for that purpose; and, in Lucas *v.* Beach, (*o*) the court held that persons associated for the purpose of passing a turnpike act, and who had subscribed for shares in the proposed road, were partners. But in each of these cases the real question was whether the plaintiff was entitled to recover from the defendants, by virtue of any *implied* contract, any remuneration for services rendered by him for the joint benefit of himself and them. It was held that he was not; and if the court had likened the case to one of partnership, instead of saying that the plaintiff and the defendants were partners, there would be no room for criticism. As it is, however, the cases are apt to be considered, and are sometimes cited, as authorities for the proposition that persons engaged in passing through parliament bills to authorize the establishment of a company are partners. In Lucas *v.* Beach it was asked in argument, "What is there to prevent a number of individuals from entering into a partnership with the limited object, in the first instance, of procuring an act of parliament, and with an ulterior object in view when the act has passed?" (*p*) The answer is that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract, to confound an agreement with its result, and to hold persons to be partners *although they have not yet acquired any right to share profits. It cannot be contended that the right to share profits would, under such an agreement as is supposed, accrue before the passing of the act, and if not, how can the parties to such an agreement be *partners* at an earlier period?

*24]

Later authorities.—For these reasons it is conceived that Holmes *v.* Higgins and Lucas *v.* Beach cannot be relied upon as authorities on the question of partnership or no partnership. (*q*) Nor are they on this point reconcilable with later decisions. In Reynell *v.* Lewis, (*r*) and Wyld *v.* Hopkins, (*r*) in which the question was much discussed,

(*n*) 1 B. & C. 74.

(*o*) 1 Man. & Gr. 417. Barnett *v.* Lambert, 15 M & W. 489, was a similar case.

(*p*) See, too, per Lord Brougham in Hutton *v.* Upfill, 2 H. L. Cas. 691.

(*q*) They are authorities for the point actually decided, viz., that a person doing work for the joint benefit of himself and others cannot recover compensation from them by virtue of any *implied* promise to pay him.

(*r*) 15 M. & W. 517.

it was held that no partnership subsisted between persons who had subscribed for the purpose of forming a railway company and of procuring the necessary act of parliament; and this, which is the correct doctrine, was also distinctly stated by Lord Cranworth, in Capper's Case, (*s*) and has been recognized on many other occasions. (*t*)

Subscribers to inchoate companies not partners.—It is a necessary result of the principles established above that persons associated for the purpose of forming a joint stock company are not partners. (*u*) They clearly are not partners in the company to be formed; and for reasons already given they cannot be considered as members of a partnership formed to start the company.

Conditional contract.—It also follows from the same principles that if persons enter into an agreement to take shares in a company formed for certain purposes and upon certain conditions, those persons are not bound to take shares in a company formed for different purposes or upon other conditions, and are not partners in such a company, unless they have accepted shares therein and *precluded themselves from objecting to the variation of their agreement. A leading case on this subject is Fox *v.* Clifton, (*x*) which, with other cases of the same class, will be found in the volume relating to companies and contributories. [*25

SECTION II.—OF QUASI PARTNERSHIPS.

Quasi partnerships.—Having now examined the nature of those agreements which are, properly speaking, contracts of partnership, it is necessary to advert to the doctrines by virtue of which persons who are not partners at all are nevertheless made subject to liabilities as if they were partners. In other words, it is necessary to explain what

(*s*) 1 Sim. (N. S.) 178.

(*t*) *E. g.*, Batard *v.* Hawes, and Batard *v.* Douglas, 2 E. & B. 287; Walstab *v.* Spottiswoode, 15 M. & W. 501; Forrester *v.* Bell, 10 Ir. Law R. 555; Hutton *v.* Thompson, 3 H. L. Cas. 161; Bright *v.* Hutton, 3 H. L. Cas. 368; Hamilton *v.* Smith, 5 Jur. (N. S.) 32; Norris *v.* Cottle, 2 H. L. Cas. 647; Besley's Case, 3 Macn. & G. 287; Tanner's Case, 5 De G. & S. 182.

(*u*) Wood *v.* Argyll, 6 Man. & Gr. 928; Hamilton *v.* Smith, 5 Jur. (N. S.) 32; Hutton *v.* Thompson, 3 H. L. Cas. 161; Bright *v.* Hutton, Id. 368.

(*x*) 6 Bing. 776.

it is that creates a *quasi* partnership, or, as it is usually called, a partnership as regards third persons. This will involve an examination of the liability which a person incurs:

1. By sharing profits.
2. By holding himself out as a partner.

1. *By sharing profits.*

In the year 1775, De Grey, C. J., laid down the proposition, in Grace *v.* Smith, (*y*) that "every man who has a share of the profits of a trade ought also to bear his share of the loss." Eighteen years afterwards, viz., in 1793, this doctrine was discussed and approved in the celebrated case of Waugh *v.* Carver; (*z*) and ever since that time until 1860 it was considered as clearly established that by the law of England all persons who shared the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated. Subtle distinctions were drawn between sharing net profits and gross returns; and between sharing net profits and payments varying with them; but it was taken for granted, both by judges and text-*writers, that where there *26] was no statutory enactment to the contrary, if net profits were shared, it necessarily followed that liabilities were incurred. Moreover, there were many persons of ability who maintained that this rule was based upon principles which were satisfactory and morally just. Other persons, however, took a different view of the propriety of the rule, (*a*) and were unable to understand why a person lending money at a fixed rate of interest should be treated as a creditor, and be exposed to no risk beyond the loss of his advance; whilst a person lending money at a rate of interest fluctuating with, and payable out of, the profits of the borrower should be treated as a partner, and be exposed, not only to the loss of his money, but also to the loss of whatever else he might have in the world. In the first edition of this work the writer expressed a hope that the rule in question would ere long cease to exist; and he ventured to characterize it as arbitrary, unjust, and as productive of the greatest confusion. Since those words were written the whole subject has been thoroughly

(*y*) 2 Wm. Bl. 998.
(*z*) 2 H. Bl. 235.
(*a*) See the report on the Law of Partnership, printed by order of the House of Commons, in 1851, and particularly the evidence of the late Commissioner Fane.

discussed, both in the highest court of appeal, (*b*) and in parliament; and the result has been that the rule, so far as it affords a conclusive test of liability, (*c*) has ceased to exist; for the House of Lords, and subsequently other courts, have repudiated it, and parliament has excluded its application from many cases in which it has been found by experience to produce inconvenience and injustice. Some notice, however, of the old law is necessary in order to understand the modifications thus introduced.

1. *State of the law anterior to Cox* v. *Hickman.*

Origin of the rule that those who share profits are liable to losses.—As already stated, the rule that persons who share profits incur liabilities as if they were partners was laid down for the first time in Grace *v.* Smith. (*d*) The question there was whether the defendant was liable to a creditor of a firm; and the material facts were that the defendant (who had *been a partner, but who had notoriously retired before the creditor's demand arose) had advanced to the firm £4000 upon the terms [*27 of being repaid the principal and of receiving, so long as it remained unpaid, interest at five per cent. and an annuity of £300 a year. The verdict was for the *defendant*, and the court refused a new trial. De Grey, C. J., gave his judgment as follows:

Judgment in Grace v. *Smith.*—"The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires; and whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith (the defendant) agreed to share the profits of the trade with Robinson (the continuing partner), or whether he only relied on those profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits, and I think there is no foundation for granting a new trial."

This judgment and not the *decision* in the case, has always been regarded as the great authority for the proposition that a person who shares profits is liable to third parties as if he were in fact a partner. The judgment itself appears to have been based upon a prior case of Bloxham *v.* Pell, (*e*) before Lord Mansfield, and in substance undistinguishable from Grace *v.* Smith. In Bloxham *v.* Pell an outgoing partner became entitled to be paid by the continuing partner a certain sum of money, with interest at five per cent., and also an annuity of £200 a year for six years, in lieu

(*b*) Cox *v.* Hickman, 8 H. L. Cas. 268.

(*c*) That participation in profits is still a *prima facie* test of partnership has been seen already, *ante* p. *12, *et seq.*

(*d*) 2 Wm. Bl. 998.

(*e*) Cited in 2 Wm. Bl. 999.

of the profits of the trade. The plaintiff sued him for a debt contracted after the dissolution, and Lord Mansfield held the defendant liable, on the ground that the agreement was a device to make more than legal interest of money, and if it was not a partnership it was a crime; and it should not lie in the defendant Pell's mouth to say it was usury and not a partnership. Lord Mansfield did not say a word in favor of the doctrine laid down in Grace *v.* Smith; but seeing a contract which, on the ground of usury, was invalid as a contract of loan, he nevertheless upheld it as a contract of partnership, which it plainly was not, but which was the only alternative if the agreement was to be upheld at all. (*f*)

Such was the origin of the rule in question, which was approved and applied in the well-known case of Waugh *v.* Carver, the leading old authority on this subject. In Waugh *v.* Carver, (*g*) two ship-agents, carrying on business at different ports, agreed to allow each other certain portions of each other's commissions and profits, but it was expressly agreed that neither of them should be prejudiced or affected by the losses of the other, *or be answerable for the acts of the other, but that each should be answerable and accountable for his own losses and acts. It was admitted by the court that this agreement created no partnership as between the parties to it; but it was nevertheless held, on the principle enunciated in Grace *v.* Smith, that both parties to the agreement were answerable for the business debts of each, and a creditor who sued both for goods supplied to one obtained judgment against both accordingly.[18]

*28]

Application of the foregoing doctrines.—Other cases, in which the same principle was applied, need only be shortly referred to. It was held that a *quasi* partnership subsisted between merchants who divided the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other; (*h*) so, between persons who agreed to share the profits of a single isolated adventure; (*i*) and between persons, one of whom was in the position of a servant to the others, but was paid a

(*f*) See Jestons *v.* Brooke, Cowp. 793, and *ante* p. *16.

(*g*) 2 H. Bl. 235, and 1 Smith's Lead. Cas.

18. **When sharing profits imposes liability for losses.**—While participation in the profits of a firm is *prima facie* evidence of partnership, and becomes conclusive, as to third persons, when not rebutted by evidence showing such participation to be in place of compensation for services (Fourth Nat. Bank *v.* Altheimer, 3 S. W. Rep. 858), still, merely sharing the profits does not, *ipso facto*, make one a partner as to third persons. Parchen *v.* Anderson, 5 Mont. T. 438; S. C., 51 Am. Rep. 65. Such participation, or the right to participate, is not an invariable test of partnership, even as to creditors. One not actually engaged in the business as a principal, and not holding himself out as a partner, cannot be held for debts incurred in the business as a dormant partner, unless in virtue of some contract, express or implied, on his part, in legal effect creating, as between him and the persons actually carrying on the business, the relation of principal and agent. Wild *v.* Davenport, 7 Atl. Rep. 295. S. P., Eastman *v.* Clark, 53 N. H. 276.

But a contract that one party shall furnish money and the other perform work for a given business, and that its net profits shall be equally divided between them, makes, without reference to their intent, a partnership as to third persons. Pettee *v.* Appleton, 114 Mass. 114; Bigelow *v.* Elliott, 1 Cliff. (U. S.) 28.

(*h*) Cheap *v.* Cramond, 4 B. & A. 663.

(*i*) Heyhoe *v.* Burge, 9 C. B. 431; Ex parte Gellar, 1 Rose 297; Hesketh *v.* Blanchard, 4 East 144.

share of the profits instead of a salary; (*k*) and between persons, one of whom was paid an annuity out of the profits made by the others; (*l*) or an annuity in lieu of any share in those profits; (*m*) so, between the vendor and purchaser of a business, if the former guaranteed a clear profit of so much a year and was to have all profits beyond the amount guaranteed. (*n*)

Moreover, the character in which a portion of the profits was received did not affect the result. For a person who as executor or trustee merely employed money in trade or business, and shared the profits arising from it, incurred all the liabilities of a partner, although he, in fact, had personally no interest whatever in the matter. (*o*) On the other hand, the *cestuis que trustent* were also liable; the creditors having an option against which of the two they would proceed. (*p*)

Again, persons who shared profits were *quasi* partners, although their community of interest was confined to the profits. In Smith *v.* Watson, (*q*) a broker, who was paid by a share of the profits arising from the sales made by him, and who was therefore a *quasi* partner with the person employing him, was nevertheless held to have no interest in the goods sold.[19]

(*k*) Ex parte Digby, 1 Deac. 341; Ex parte Rowlandson, 1 Rose 92; and see Withington *v.* Herring, 3 Moo. & P. 30.

(*l*) Re Colbeck, Buck. 48; Ex parte Hamper, 17 Ves. 412; Ex parte Chuck, 8 Bing. 469.

(*m*) Bloxham *v.* Pell, 2 Wm. Bl. 999, *ante* p. *27.

(*n*) Barry *v.* Nesham, 3 C. B. 641. Compare Pott *v.* Eyton, Id. 32, *infra*, p. *30.

(*o*) Wightman *v.* Townroe, 1 M. & S. 412; Ex parte Garland, 10 Ves. 119; Labouchere *v.* Tupper, 11 Moore P. C. 198.

(*p*) See Goddard *v.* Hodges, 1 Cr. & M. 33. In this case the court held that the *cestui que trust* was liable to creditors, and that *therefore* he could not sue the copartners of his own trustee. But surely this was wrong. There was no partnership between the plaintiff and defendants, no contract between them.

(*q*) 2 B. & C. 401; and see Burnell *v.* Hunt, 5 Jur. 650, Q. B., and Cheap *v.* Cramond, 4 B. & A. 663.

19. Illustrations of the rule.—*In the following instances, the element of community of profits was held to create the partnership liability as to third persons:*

Where A and B agreed that A should take certain negroes of B, and work them in a blacksmith's shop, furnish all supplies, pay all expenses, and give B one-half of the net proceeds of the shop for the use of the negroes. Buckner *v.* Lee, 8 Ga. 285.

Where there was a lease of a steam-mill and appurtenances, reserving as rent one-half of the net profits of the business, and also providing that the lease should not be assignable, and should cease on the lessee's death, or his inability from any cause to give his personal attention thereto. Dalton City Co. *v.* Hawes, 37 Ga. 115.

Where a father and son, both living on the same farm, worked it together under an agreement that the father was to furnish the land and the stock, and provisions for the stock, and the son to furnish the hands and to superintend the work, and the crop to be equally divided between them, and nothing more appeared. Adams *v.* Carter, 53 Ga. 160. S. P., Pettee *v.* Appleton, 114 Mass. 114; Brown *v.* Higginbotham, 5 Leigh (Va.) 583.

Where there was a contract for one to furnish factory and materials, and another to manufacture, and either to sell the product, and the proceeds to be divided. Farmers' Ins. Co. *v.* Ross, 29 Ohio St. 429.

Where the owner of a tug agreed with the owner of a barge that both vessels should be employed in a freighting business, the wages of the servants of the asso-

Distinction between sharing profits and gross returns.—But notwithstanding the extent to which the doctrine laid down in Grace *v.* Smith was carried, it was long ago established that persons who shared only gross returns were not *quasi* partners; [*29 and subtle distinctions were taken between a payment out of profits, and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits, not as profits, but as something else. These subtleties were attributable, on the one hand, to the establishment of the rule that persons who shared profits should be answerable for losses, and on the other to a disinclination to apply that principle to cases in which it was clear that those who shared the profits never intended to become partners *inter se*.

First, as to gross returns. In Benjamin *v.* Porteus, (*r*) an agreement was made between the plaintiff and a broker, by which the broker, instead of a commission on the sales effected by him for the plaintiff, was to have the whole proceeds of the sales

ciation and expenses, except for repairs, to be paid out of the earnings, and the balance or profits to be divided between them in proportion to the stipulated value of the vessels. Bowns *v.* Pioneer Tow Line, 2 Sawy. (U. S.) 21. See, also, Whitney *v.* Ludington, 17 Wis. 140; Appleton *v.* Smith, 24 Wis. 331; Upham *v.* Hewitt, 42 Wis. 85.

So, also, where several common carriers, each having its own line, associate and form what, from the shipper's point of view, is a continuous line, and contract to carry goods through at an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper for a loss taking place on any part of the whole line. Wyman *v.* Chicago and Alton R. Co., 4 Mo. App. 35.

And where R. advanced $700 to M., a traveling showman, under the agreement that after payment of expenses R. was to receive back the $700, and one-half of the net profits—*Held*, that R. and M. were partners as to third persons, irrespective of any agreement to the contrary between themselves. Haas *v.* Roat, 16 Hun (N. Y.) 526.

On the other hand, it has been held that where three persons agree, the one to do certain things and the other two certain other things, each at his own expense, each to be entitled to an equal share of the profits arising out of the contract, this does not constitute them all partners, and make them all liable for expenses incurred by either in the performance of his or their part of the contract. Heckert *v.* Fegely, 6 Watts & S. (Pa.) 139. So, also, a pool arrangement between steamboat owners, whereby the excess of net earnings of one boat over those of the other is to be divided at the end of the season, does not, alone, constitute a partnership so as to create a joint liability for the negligence of either. Fay *v.* Davidson, 13 Minn. 523.

And where a non-resident commercial firm agreed with two resident firms, whereby one of the latter firms was to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, was to pay for the same, and each of the resident firms agreed to receive, instead of fixed sums in payment for their services, certain proportions of the profits to arise from the sales of the goods so bought, and to share in any losses resulting from said sales—it was held that this contract did not make the said firms commercial partners even as to third persons, it appearing that they did not so intend, and that they had not held themselves out as partners. Chaffraix *v.* Laffitte, 30 La. Ann. 631. See, also, Einstein *v.* Gourdin, 4 Woods (U. S.) 415; Lafon *v.* Chinn, 6 B. Mon. (Ky.) 305.

(*r*) 2 H. Bl. 590. See, too, Dixon *v.* Cooper, 3 Wils. 40.

less 2*s.* 6*d.* per lb., which was to be paid to the plaintiff. This was held not to give the broker such an interest in the goods sold by him as to render him an incompetent witness for the plaintiff, his principal, in an action for their price. This decision seems to have paved the way to others which went far beyond it. In Dry *v.* Boswell, (*s*) Lord Ellenborough held that no *quasi* partnership subsisted between the owner of a barge and the man who worked it, and who received for his wages half the gross earnings; and in Mair *v.* Glennie, (*t*) where the captain of a ship was to be paid one-fifth of the profit or loss on an intended voyage, it was held that he and the owners of the ship were not *quasi* partners. It had previously been decided, in Wilkinson *v.* Frazier, (*u*) that the crew of a whaling ship who were to be paid by the owners a certain share of the oil brought home, were not partners with them.

The distinction between gross returns and profits (or, as they are sometimes called, gross profits and net profits), was acted upon by Mr. Baron Parke in Heyhoe *v.* Burge, (*x*) when he told the jury "a person who shares gross profits is not a partner; but a person who shares net profits is *prima facie* to be considered as a partner." (*x*) [20]

Distinction between sharing profits and payments varying with them.—Next, as to the distinction between payments out of profits as such, and payments not out of them as such. The great enforcer of the distinction in question was Lord Eldon, who seems to have been led to make it by the impossibility of otherwise reconciling Grace *v.* Smith and Bloxham *v.* Pell. In Ex parte Hamper (*y*) his lordship is reported to have said:

"It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labor he shall not have a specific interest in the business, but a given sum of money even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner, and in question with third persons no stipulation can protect him from loss."

*Other cases decided by his lordship contain *dicta* to the same effect, (*a*)
*30] and the distinction must be considered as settled in point of law. The latest

(*s*) 1 Camp. 330; and see Wish *v.* Small, in the note there.

(*t*) 4 M. & S. 240. The expression "profit or loss," in this case, must have been held equivalent to gross returns.

(*u*) 4 Esp. 182. See *ante* p. *19, note (*x*).

(*x*) Heyhoe *v.* Burge, 9 C. B. 431; see Id. 440, 444.

20. Effect of sharing gross returns.—An agreement between two concerns to share commissions on sales of goods to be forwarded by one to the other, does not create a partnership between the two firms. Pomeroy *v.* Sigerson, 22 Mo. 177. So, where a land-owner arranges that another shall cut posts on the lands at his own expense, on shares, receiving half the posts and paying all the cutting expenses, these expenses cannot be regarded as partnership expenses, nor is the business such as to authorize any necessary inference of partnership. Denis *v.* Saunders, 36 Mich. 369. S. P., Braley *v.* Goddard, 49 Me. 115. Nor does the appointment, by the different proprietors of several sections of a public line of travel, of a common agent at each end of the route to receive fares and give through tickets, of itself, constitute them partners as to passengers who purchase such tickets, so as to render each one liable for losses occurring on any portion of the line. Ellsworth *v.* Tartt, 26 Ala. 733.

(*y*) 17 Ves. 412.

(*a*) See Ex parte Rowlandson, 1 Rose 89; Ex parte Langdale, 18 Ves. 300; Ex parte Watson, 19 Id. 461.

case upon this subject is Pott *v.* Eyton. (*b*) The defendant Eyton was concerned in a colliery, and the defendant Jones kept a shop for supplying the workmen at the colliery. Eyton built the shop; licenses to sell tea, &c., were taken in his name, and he paid for the goods supplied to the shop. Jones managed the shop business. Eyton received first seven and afterwards five per cent. on the amount of all sales to the workmen, and Jones had all the rest of the profits of the shop from whatever source derived. The question was whether Eyton and Jones were partners or *quasi* partners. The jury found that there was no agreement to share profit and loss, and the Court of Common Pleas acted on the distinction taken in Ex parte Hamper, and on the distinction between profits and gross returns, and held that no partnership or *quasi* partnership existed.[21]

Loans.—A loan of money to be repaid with interest, however exorbitant, did not constitute a *quasi* partnership between the borrower and the lender (*c*) unless profits were expressly pointed at as the fund for payment. (*d*)[22]

2. *Modifications introduced by the House of Lords in Cox* v. *Hickman.*

Such was the state of the law when the case of Cox *v.* Hickman came before the House of Lords; and that tribunal, in effect, decided

(*b*) 3 C. B. 32. See further, as to this case, *infra*, § 2 (2).

21. Distinction between sharing profits, as such, and payments varying with them.—The participation in the profits of a business does not in all cases make the participant a partner as to third persons; to have that effect the participation must be in the profits *as such*, under circumstances which give him a proprietary right as principal trader in such profits before division. Burnett *v.* Snyder, 81 N. Y. 550. As we have already seen in a former note (p. *13, note 6), a compensation for services, in the form of a commission on profits, creates no such interest in the concern as constitutes a partnership.

The rule we are considering has no application to a case of mere service or special agency, where the employee has no power in the firm, and no such interest in the profits as will enable him to go into equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the rule, because, when not so interested, his condition is not different from that of an ordinary creditor. Berthold *v.* Goldsmith, 24 How. (U. S.) 536.

In Louisiana, however, it is held that an employee whose compensation depends on the profits of the business, and who, if there are no profits, is to receive nothing, and who on several occasions has *held himself out* as a partner, will be responsible as such to third persons, though *inter se* the parties never intended a partnership. Lee *v.* Bullard, 3 La. Ann. 462. Compare Halliday *v.* Bridewell, 36 Id. 238.

(*c*) Grace *v.* Smith, 2 Wm. Bl. 998.

(*d*) Gilpin *v.* Enderby, 5 B & A. 954; Fereday *v.* Hordern, Jac. 144; Bloxham *v.* Pell, *ante* p. *27. See, as to the first two cases, *ante* p. *16.

22. Loans.—In Connecticut it is held that one who receives profits in consideration of furnishing capital is a partner as to third persons, even though it be stipulated that the capital so furnished should be regarded as a loan, and the party furnishing it a mere creditor. Parker *v.* Canfield, 37 Conn. 250. But a better expres-

that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents. (*e*)

The question in Cox *v.* Hickman (*f*) was substantially whether the scheduled creditors to a deed of arrangement, who were to be paid their debts out of the profits of their debtors' business, were liable to debts contracted by the trus*tees in carrying on that business pursuant to the deed; (*g*) and it was ultimately decided that they were not. [*31

The Lords were unanimous in treating the matter before them as a mere question of agency, and in holding that the circumstances that

sion of the rule is believed to be that where money is loaned for the benefit of a business, and is to be refunded absolutely, without regard to the profits, the fact that the lender is to receive a share of the profits, to apply on the indebtedness, does not make him liable to creditors as a partner; to have that effect, the payment of the advancement must depend upon the profits. Eager *v.* Crawford, 76 N. Y. 97.

Thus, the mere fact that one is to receive a certain portion of the net profits of a firm, in consideration of his acceptance of certain drafts, will not make him liable as a partner, if there was no holding out, and his name has not been used as partner. Polk *v.* Buchanan, 5 Sneed (Tenn.) 721.

So, where the lender has the option to share the profits or to receive back his money with interest, he is not a partner. Moore *v.* Walton, 9 Bankr. Reg. 402. To same effect, Re Francis, 2 Sawy. (U. S.) 286; Re Ward, 25 Int. Rev. Rec. 289.

In Curry *v.* Fowler (87 N. Y. 33; S. C., 41 Am. Rep. 343), a loan of money to purchase and erect buildings, the lender to receive interest and half the profits of sale, which the borrowers guaranteed at a certain amount, the loan and profits being secured by mortgage, was held not to constitute the lender a partner as to third persons. S. P., Rosenfield *v.* Haight, 53 Wis. 260; S. C., 40 Am. Rep. 770; Ford *v.* Smith, 27 Wis. 261.

In Swann *v.* Sanborn (4 Woods (U. S.) 625), the United States Circuit Court sitting in Florida held that where S. loaned money to C., to be invested in business by him, and agreed to take, in lieu of an interest therein, a certain share of the profits of the business, persons who became creditors of C. after this arrangement was ended, and who had never heard of it, could not hold S. as a partner.

(*e*) Cox *v.* Hickman, 8 H. L. Cas. 268.

(*f*) Hickman *v.* Cox, 18 C. B. 617, and 3 C. B. (N. S.) 523; Cox *v.* Hickman, 8 H. L. Cas. 268. See, also, The Stanton Iron Co., 21 Beav. 164; Price *v.* Groom, 2 Ex. 542, and *ante* p. *21. Owen *v.* Body, 5 A. & E. 28; and Janes *v.* Whitebread, 11 C. B. 406, may also be referred to on the subject of partnership created by creditors' deeds; and as to the non-liability of inspectors for debts not contracted by them as principals, see Redpath *v.* Wigg, L. R., 1 Ex. 335; Eastbrook *v.* Barker, L. R., 6 C. P. 1.

(*g*) The defendants actually sued were two trustees, who were also scheduled creditors; one of them never acted as trustee, and the other had retired from the trusteeship before the debts in question were contracted. But all the judges agreed that there was no difference between the liability of the defendants and that of the other scheduled creditors.

the profits of the business were to be shared by the scheduled creditors was by no means sufficient to show that the trustees were their agents and authorized to act as such on their behalf. (*h*)

Observations on the decision of the House of Lords.—In Cox *v.* Hickman the persons whose liability was in question were only entitled to share profits to the amount of their respective debts, and this circumstance was greatly relied upon as distinguishing the case from Waugh *v.* Carver, and others of that class, in which the profits were shared to an indefinite extent. But it is plainly not consistent with the reasoning in Cox *v.* Hickman to hold that the mere fact that profits are shared indefinitely raises an irrebuttable presumption that those who share them are the principals of those who make them. The circumstance that one person shares all the profits made by another is, no doubt, an important element to be considered in determining the true relation in which those persons stand to each other; but it no more conclusively shows such relation to be one of agency, than it conclusively shows that the persons in question are truly partners *inter se.* In fact, although the House of Lords, in deciding Cox *v.* Hickman, professed to overrule no previous authority, the effect of that decision has unquestionably been to put a great branch of partnership law on a substantially new footing. The following more recent decisions conclusively show this.

More recent decisions.—In Kilshaw *v.* Jukes (*i*) it was held that a person who advanced money and supplied goods to two others, on the terms of being repaid the advances and price of the goods out of the profits of a building speculation, if such profits should be sufficient for the purpose, was not liable to debts contracted by them for the purposes of the speculation.

*32] *In the English and Irish Church and University Insurance Society (*k*) it was held that the holders of policies of insurance who were entitled to be paid, out of the funds of an insurance society, not only the sums originally insured, but also such bonuses as by the rules of the society might be added thereto out of the profits of the society, were not liable as partners with the members of the society either to the holders of other policies issued by it, or to its other creditors.

(*h*) Baron Bramwell had taken the same ground. See 3 C. B. (N. S.) 552.

(*i*) 3 Best & Sm. 847.

(*k*) 1 Hem. & M. 85. Compare Re Albion Life Assur. Soc., 16 Ch. D. 83.

In Bullen *v.* Sharp (*l*) the whole profits of a son's business were assigned over to his father and another person upon trust, first, to pay the father £500 a year, to be increased to a sum equal to one-fourth of the profits when one-fourth thereof amounted to more than £500 a year; secondly, to pay an annuity to the son; thirdly, to form a reserve fund for the benefit of the son; and fourthly, to pay the residue of the profits to the son. The Court of Common Pleas held the father liable for the engagements of the son upon the ground that the profits having been assigned to him, he had a direct interest in the business. On appeal, however, this decision was reversed, on the ground that the business was really the son's, and that the father's interest in it was not such as to render the son his agent for carrying it on.

In Shaw *v.* Galt (*m*) it was held that a clerk, entitled to a fixed salary, and in addition thereto to one-third of the net profits of the business of his employers, was not liable to their creditors. The salary and share of profits were only intended as a remuneration for his services, and the profits were to be ascertained from balance-sheets prepared by the employers upon the principle theretofore adopted by them.

In Holme *v.* Hammond (*n*) five persons agreed to become partners for seven years, and to share profits and losses equally, and they further agreed that if any partner died within the seven years, the survivors should continue the business and pay to the executors of the deceased partner the same share of profits which he would have had if living. One of the partners died; he had no capital in the firm, but on his *death the firm was indebted to him in respect of undrawn profits and other matters. After his death the business [*33 was carried on by the survivors; his executors took no part in the management of the business, but they claimed one-fifth of the profits made since his death, and they were furnished with accounts in which they were credited with such profits. The plaintiff sued the executors in respect of a contract made by the surviving partners after the death of the deceased partner, but it was held that the executors were not liable; for the surviving partners were not their agents, and although the case did not fall within the provisions of 28 and 29 Vict., c. 86, it was governed by the principles laid down in Cox *v.* Hickman.

(*l*) L. R., 1 C. P. 86, reversing 18 C. B. (N. S.) 614.

(*m*) 16 Ir. Com. L. Rep. 357.

(*n*) L. R, 7 Ex. 218.

Again, in Mollwo, March & Co. *v.* Court of Wards, (*o*) a person advanced large sums of money to merchants, and took as a security a charge on their business, with extensive powers of control, and stipulated for a large commission on their profits whilst anything remained due to him, and for payment of his principal and twelve per cent. interest. The lender had not, in fact, taken any profits, and the above arrangement was afterwards varied by his taking a mortgage for his principal and interest. He was held not liable for debts contracted by them whilst the above agreement was in force. The court held that the transaction was really a loan. It was urged in vain that even if there was no partnership, the debtors were the agents of the creditor to earn the principal, interest and commission to which he was entitled. But this contention very properly failed; there being no more reason for inferring agency than partnership from an agreement to share profits.

Observations on these cases.—There can be no doubt that in all these cases the decisions would have been the other way had they occurred before Cox *v.* Hickman; and they are particularly valuable as showing that the principles on which that case was decided by the House of Lords may now be safely relied upon, in opposition to the old rule which, before that important decision, was considered too firmly settled to be questioned. In fact, the strong tendency of the above decisions is to establish the doctrine that no *person who *34] does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents; (*p*) and, in the author's opinion, this is now the law. (*q*) At the same time, persons may find that they are partners for all purposes, although they only intended to be so for purposes beneficial to themselves. (*r*)

For the guidance, however, of those who may think that the writer has gone too far in representing the old law as completely superseded, the following more limited propositions are submitted as at least

(*o*) L. R., 4 P. C. 419. Compare Pooley *v.* Driver, 5 Ch. Div. 458, noticed *infra*, p. *38.

(*p*) As in Steel *v.* Lester, 3 C. P. D. 121.

(*q*) See Baron Bramwell's judgment in Bullen *v.* Sharp, L. R., 1 C. P. 86; Holme *v.* Hammond, L. R., 7 Ex. 218; Mollwo, March & Co. *v.* Court of Wards, L. R., 4 P. C. 419. See, also, Ex parte Tennant, 6 Ch. D. 303.

(*r*) See Pooley *v.* Driver, 5 Ch. D. 458, noticed *infra*, p. *38.

conclusively established, and as applicable even in cases not within 28 and 29 Vict., c. 86.

Effect of Cox v. *Hickman.*—1. That persons who share the profits of a business are, like other persons, only liable for the acts of themselves and of their real or ostensible agents.

2. That whether in any particular case the relation of principal and agent does or does not exist between one person who carries on a business and another person who shares its profits depends not upon the mere fact that the business is carried on, more or less, for the benefit of the latter, but upon all the circumstances of the case.

3. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to share the gross returns of a business or adventure conducted by another.

4. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid definite sums out of the profits made by another.

5. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid sums varying with the profits made by another.

6. That the relation of principal and agent is not constituted merely by the existence of a trust, entitling one person to profits made by another.

7. That *prima facie* the relation of principal and agent is constituted by an agreement entitling one person to share the [*35 profits made by another to an indefinite extent, but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.

8. That in these, as in all other cases, the courts will be astute to defeat fraud, and to hold partnerships to be created if they are intended, although the intention may be carefully concealed.

The first, second, fourth and sixth of these rules appear to be warranted by Cox *v.* Hickman and Mollwo, March & Co. *v.* Court of Wards; the third and fifth, by older authorities, not touched by those decisions; the seventh is probably the most correct mode of expressing the effect of Cox *v.* Hickman and Mollwo, March & Co. *v.* Court of Wards on Waugh *v.* Carver, and other cases of that class; the eighth speaks for itself, and is illustrated by Pooley *v.* Driver and Ex parte Delhasse, which will be noticed presently.

3. The act of 28 and 29 Vict., c. 86.

In order to amend the law by which persons sharing profits were held liable to losses, the act of 28 and 29 Vict., c. 86, was passed. This act (commonly called Bovill's act) is entitled "An act to amend the law of partnership." It received the royal assent on the 5th of July, 1865, and enacts as follows:

1. The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, *of itself*, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, *of itself*, render such servant or agent responsible as a partner therein, nor give him the rights of a partner. (*s*)

*36] *3. No person being the widow or child of the deceased partner of a trader, and receiving, by way of annuity, a portion of the profits made by such trader in his business, shall, *by reason only of such receipt*, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

4. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good will of such business, shall, *by reason only of such receipt*, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good will as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. (*t*)

Interpretation of "person."—6. In the construction of this act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

Upon the foregoing enactment it is to be observed—

Effect of the statute.—1. That it applies to an extremely limited

(*s*) *Quære* if this deprives him of a right to an account? See Harrington *v.* Churchward, 6 Jur. (N. S.) 576. The object of the act was not to deprive the servant of his rights against his master, but to protect each from liability to third parties by reason of the acts of the other.

(*t*) See Ex parte Mills, 8 Ch. 569; and Re Stone, 33 Ch. D. 541. But a secured creditor can sell or foreclose, as the case may be, even to the prejudice of other creditors. Baddeley *v.* Consolidated Bank, 34 Ch. D. 536.

number of cases, and leaves wholly untouched a large number of agreements of common occurrence, *e. g.*, all such as had to be dealt with in Waugh *v.* Carver, Smith *v.* Watson, Cheap *v.* Cramond and Cox *v.* Hickman. All such cases, however, must now be dealt with on the principles laid down by the House of Lords in the last-named case. (*u*)

2. That it in no way modifies the doctrine by which persons who hold themselves out as partners incur the liabilities of partners.

3. That to entitle a person lending money to the benefit of the act there must be a contract in writing; and it seems that such contract must be signed. (*x*)

4. That in the case of servants, agents, widows and children, *and of persons selling a good will, there is no necessity for any contract in writing. [*37

5. That unless a retiring partner is brought within the first, second or third section, he is in no better position than other persons.

6. That the persons within the second and third sections are not within the fifth.

7. That persons who lend money or sell a good will in consideration of a share of profits cannot, in respect of such loan or profits, compete with any other creditors upon a distribution of their debtors' assets. (*y*)

8. That the third section only applies to widows and children of deceased partners of traders, *i. e.*, it is presumed, of persons formerly liable to be adjudicated bankrupt as traders.

9. That the fifth section does not deprive the lender of his right to retain any security he may take for his money, (*z*) nor to foreclose such security. (*a*)

10. That the act may be made an instrument of fraud, if a person is allowed to lend to the same person a small sum in consideration of a large share of profits, and a large sum in consideration of fixed interest. In such a case if a fraud were intended, it would probably be defeated by holding the lender liable as a partner, or, at least, by holding him to be within the fifth section as to both loans. But

(*u*) See Holme *v.* Hammond, L. R., 7 Ex. 218; Mollwo, March & Co. *v.* Court of Wards, L. R., 4 P. C. 419.

(*x*) Pooley *v.* Driver, 5 Ch. D. 458, where, however, there was only a draft contract.

(*y*) Ex parte Taylor, 12 Ch. D. 366; Ex parte Corbridge, 4 Ch. D. 246.

(*z*) Ex parte Sheil, 4 Ch. D. 789.

(*a*) Baddeley *v.* Consolidated Bank, 34 Ch. D. 536.

where there is no fraud, a person who has advanced money under the act, and has also *bona fide* made other advances not under it, can, on the bankruptcy of the borrower, prove for the latter advances, although not for the former. (*b*) A person, however, who lends money on the terms of sharing profits and then agrees to take a fixed rate of interest instead of them, is within the fifth section of the act and cannot prove in competition with other creditors. (*c*)

11. That it is apparent from the words "*of itself*" and "*by reason only*," in the first four sections of the statute, that it was not intended to relieve persons who are really partners (although dormant) from the liabilities incident to that position. *Agreements intended to secure the benefit of the act to lenders of money are constantly framed with all sorts of clauses which expose them to the risks they are so anxious to avoid.

*38]

Cases not within the act.—In Baddeley *v.* Consolidated Bank (*d*) a lender of money to a railway contractor on the security of his plant, and on the terms of receiving interest and a share of his profits, was held to be liable to his debts, the formal contract between the parties being, in truth, a device to conceal the fact that they were really partners.

In Ex parte Delhasse (*e*) it was held that a loan to a firm on the security of the business of the borrowers and to be repaid out of it, coupled with a power to dissolve their partnership, was not within the act.

In Syers *v.* Syers (*f*) the plaintiff lent the defendants money on the terms that they should execute a deed of partnership giving the plaintiff a share of the profits in the business of the defendants, to be drawn up under the statute in question; and it was held that this agreement constituted the parties to it partners in the business.

In Pooley *v.* Driver (*g*) a carefully drawn agreement, intended to secure to the lender the benefit of the statute, signally failed to do so. In that case A and B entered into partnership for fourteen years, with a capital of £30,000, of which £10,000 was to be raised by way of

(*b*) See Ex parte Mills, 8 Ch. 569.

(*c*) Re Stone, 33 Ch. D. 541.

(*d*) 34 Ch. D. 536. The correspondence was relied upon to show the real truth.

(*e*) 7 Ch. D. 511.

(*f*) 1 App. Cas. 174.

(*g*) 5 Ch. D. 458. Compare this with Mollwo, March & Co. *v.* Court of Wards, L. R., 4 P. C. 419, noticed *ante* p. *33, and with Ex parte Tennant, 6 Ch. D. 303, where a father claimed to be a partner with his son, contrary to the true meaning of an agreement framed to avoid a partnership.

loan under the above act. The capital was to be divided into sixty shares of £500 each, of which twenty were to belong to the persons advancing the £10,000, in proportion to their advances. The net profits were to be also divided into sixty shares, of which twenty were to belong to the same persons in the same proportion. At the end of the partnership an account was to be taken in the usual way, the moneys advanced were to be returned; but if it appeared that the persons advancing the £10,000 had received more than their shares of profits, the excess was to be refunded, but not *to an amount exceeding their advances. C advanced £2500 to A and B [*39 on the terms of an agreement, which incorporated the agreement between A and B, which provided for the employment of the capital (including C's advances) in the business, gave C liberty to inspect and take copies of the partnership books, entitled him to five-sixtieths of the estimated annual profits of the business, and provided for a final account and repayment, at the end of the partnership, of the £2500, unless it should appear that he had received more than his share of profits, in which case he was to refund the excess, not exceeding his £2500.

There was also a clause empowering A and B to pay out the £2500 in the event of C's bankruptcy, or of any dispute between the parties, and an arbitration clause. This agreement with C was drawn up in writing, but remained in draft, and was never signed. But D also advanced money on the same terms, embodied in a written agreement duly signed by him and A and B. It was held by Jessel, M. R.: 1. That the unsigned draft agreement with C was not a sufficient writing to bring the case within the statute; 2. That the signed agreement with D did not entitle him to the protection of the statute; and 3. That notwithstanding Cox *v.* Hickman, and that class of cases (*ante* p. *30), both C and D were dormant partners, and liable as such for the debts of A and B. The judgment in this case is very important, and well deserves attentive study. It proceeded upon the ground that partnership is *prima facie* the result of participation in profits; and that the true result of the whole arrangement was that the advances were not real loans, but were, in truth, contributions of capital under color of loans.

One of the most remarkable features of this case was that when the time arrived for the repayment of the advances, it might be found that not only was there nothing to repay, but that the so-called lenders

might have to refund part of what they had already received, even to the extent of their so-called loans. (*h*) This practically amounted to a possible loss of their advances, and distinguished the case at once from a true *contract of loan; for in such a contract the money lent is to be repaid intact, and the only risk run is the insolvency of the borrower. (*i*)[23]

*40]

2. *By holding oneself out as a partner.*

Persons who hold themselves out as partners incur the liabilities of partners.

The other mode, in which a person not a partner becomes liable as if he were one, is by so conducting himself as to lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact. The principle of this is obvious and satisfactory, and is well laid down by Eyre, C. J., in the great case of Waugh *v.* Carver. (*k*) His lordship there said:

"Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing."

The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct. (*l*)[24]

(*h*) See the clauses, 5 Ch. D. 463, 466, and the comment on them at p.*492.

(*i*) See *ante* p.*16.

23. For an extended and interesting discussion of this subject, see article by Guy C. H. Corliss, 30 Alb. L. J. 26.

(*k*) Waugh *v.* Carver, 2 H. Bl. 235. See Scarf *v.* Jardine, 7 App. Cas. 345, now the leading case on this subject. The principle will be found stated to the same effect in Ex parte Watson, 19 Ves. 461; Ex parte Matthews, 3 Ves. & B. 125; De Berkom *v.* Smith, 1 Esp. 29.

(*l*) As to which, see Pickard *v.* Sears, 6 A. & E. 469; Freeman *v.* Cooke, 2 Ex. 654; Carr *v.* L. & N. W. Rail. Co., L. R., 10 C. P. 316.

24. General rule as to holding out—the estoppel.—The rule is well settled, by numerous adjudications, that one who holds himself out to the world as a partner, and thereby obtains credit himself, or gives credit to the firm, will be held responsible as such, though, in fact, he is

Effect of knowledge that a person who holds himself out as a partner is not a partner.—It is therefore wholly immaterial whether the person holding himself out as a partner does or does not share the profits or losses. (*m*) Nay more, even if it *be known that he does not share either, still he may be liable. For although a person who lends his name may stipulate for an indemnity from those who use it, it by no means follows that he ought not to be liable to third parties merely because they are aware of such stipulation. His name does not induce credit the less on account of his right to be indemnified by others against any loss falling in the first instance on himself; and although, in the case supposed, he cannot be believed to be a *partner*, the lending of his name does justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment. (*n*) [*41

However, in Alderson *v.* Pope (*o*) Lord Ellenborough held "that

not a partner. Benedict *v.* Davis, 2 McLean (U. S.) 347; Buckingham *v.* Burgess, 3 Id. 364, 549; Campbell *v.* Hastings, 29 Ark. 512; Carmichael *v.* Grier, 55 Ga. 116; Daily *v.* Coons, 64 Ind. 545; Hancock *v.* Hintrager, 60 Iowa 374; Woodward *v.* Clark, 30 Kan. 78; Rice *v.* Barrett, 116 Mass. 312.

If credit be given on the strength of the holding out, the party is bound on the principle of estoppel. Cirkel *v.* Ellis, 31 N. W. Rep. 513. In a suit against a firm, the jury are not required to decide whether the partnership actually existed, but only whether it was held out to the plaintiffs as existing. Young *v.* Smith, 25 Mo. 341; Shackleford *v.* Smith, Id. 348; Stephenson *v.* Cornell, 10 Ind. 475. The principle is the same whether the holding out be as to a single enterprise or the assertion of a general partnership. Shafer *v.* Randolph, 99 Pa. St. 250.

Thus, where an obligation, signed by two persons with defendant, is, on his representation that he is a member of a partnership, exchanged for another signed by the latter alone, he cannot, in an action by the holder, deny that he is a partner. Burbank *v.* Haas, 9 La. Ann. 528. Notwithstanding the person held out as a partner, or dormant partner, has not signed the articles of partnership, he may be sued and held jointly with those who did sign them. Wood *v.* Cullen, 13 Minn. 394. And the fact that a number of persons held themselves out as partners, will, *prima facie*, establish a partnership in an action by them against third persons, or by one standing in the same position. McCarthy *v.* Nash, 14 Minn. 127.

In Tams *v.* Hitner (9 Pa. St. 441), two out of three partners gave a note, in the name of the two, as a distinct firm, but the three, in the course of their business, induced the belief that such was their firm name. *Held*, that all three were liable as partners, on the note.

(*m*) Ex parte Watson, 19 Ves. 461. See, also, Kirkwood *v.* Cheetham, 2 Fost. & F. 798, where A was B's agent, and A held himself out as B's partner; both A and B were decided to be liable for goods supplied to A for B. Compare Hardman *v.* Booth, 1 Hurlst. & C. 803.

(*n*) See acc. Brown *v.* Leonard, 2 Chitty 120.

(*o*) 1 Camp. 404, note.

where there was a stipulation between A, B and C, who appeared to the world as copartners, that C should not participate in the profit and loss, and should not be liable as a partner, C was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership." The report of this case states no more than what is here extracted, and the reader is left in doubt as to the meaning of the words "should not be liable as a partner." If these words meant that C was to be indemnified by A and B, the observations already made show, it is conceived, that the decision was erroneous. But if they meant that C would not be liable at all to third parties for the acts of A and B, then the question would arise whether this was not altogether inconsistent with C's conduct, and whether the maxim "*Protestatio facto contraria non valet*" would not apply. In any point of view the reported note of the case is unsatisfactory.[25]

Effect of fraud.—Moreover, if a person has been induced by promises of irresponsibility or by fraud to hold himself out as a partner with others, this circumstance does not relieve him from liability to third parties who have been induced by his conduct to trust *him as well as them, and who have had nothing to do with the promises or fraud practiced upon him. (*p*)

*42]

Observations on the phrase "holding out."—The expression in Waugh *v.* Carver, "If he will lend his name as a partner, he becomes, as against all the rest of the world, a partner," requires qualification;

25. **The holding out must have been relied on.**—The principle upon which a liability as a partner is fastened upon one who is in fact, not a partner, being analogous to that of an estoppel *in pais*, it follows that where one is not misled to his prejudice, either positively or tacitly, by the party whom he seeks to hold liable, there can be no such estoppel. Marble *v.* Lypes, 2 So. Rep. 701. The mere act of holding out does not make the party held out, in fact, a partner, nor render him liable as such, except to those who are thereby led to believe he is a partner, and who give credit to the supposed firm upon such belief. Wood *v.* Pennell, 51 Me. 52. If the creditor be ignorant of the holding out, the principle of estoppel does not apply, and the party held out is not a partner as respects such creditor. Thompson *v.* First Nat. Bank, 111 U. S. 529; Fitch *v.* Harrington, 13 Gray (Mass.) 468; Benedict *v.* Davis, 2 McLean (U. S.) 347.

(*p*) See Collingwood *v.* Berkeley, 15 C. B. (N. S.) 145; Maddick *v.* Marshall, 16 C. B. (N. S.) 387, and 17 Id. 829; Ellis *v.* Schmæck, 5 Bing. 521; Ex parte Broome, 1 Rose 69. It will be seen in the volume relating to companies that persons induced to join companies, by the false and fraudulent statements of directors, cannot, on that ground, escape from liability to creditors.

for the real ground on which liability is incurred by holding oneself out as a partner is that credit has been thereby obtained. This was put with great clearness by Lord Wensleydale in Dickinson *v.* Valpy, (*q*) in which he said: "If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted upon that statement." (*r*)

What constitutes a "holding out."—Further, a person may hold himself out or permit himself to be held out as a partner, and yet conceal his name. He may be referred to as a person who does not wish to have his name disclosed; and if he is so referred to by his authority he will incur liability as a *quasi* partner. (*s*) But it follows, from the principles above explained, that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered *into. (*t*) It also follows that no person can be fixed with liability on the [*43 ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent, (*u*) and secondly, it must have been known to the person seeking to avail himself of it. (*x*) In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence

(*q*) 10 B. & C. 140. See, also, Ford *v.* Whitmarsh, Hurlst. & W. N. P. 53. Lord Blackburn, in Scarf *v.* Jardine, 7 App. Cas. 357, expressed the same idea in different words.

(*r*) See, too, Vice *v.* Anson, 7 B. & C. 409, where the defendant held herself out as a partner, but not to the plaintiff.

(*s*) Martyn *v.* Gray, 14 C. B. (N. S.) 824. See, also, Maddick *v.* Marshall, 16 Id. 387, and 17 Id. 829.

(*t*) Baird *v.* Planque, 1 Fost. & F. 344.

(*u*) In Fox *v.* Clifton, 6 Bing. 776; Edmundson *v.* Thompson, 2 Fost. & F. 564, and 8 Jur. (N. S.) 235, the actions failed on this ground. See, also, Cornelius *v.* Harrison, 2 Fost. & F. 758.

(*x*) Pott *v.* Eyton, 3 C. B. 32, failed on this ground.

of the second, the person seeking to make him liable has not in any way been misled. (*y*) [26]

Continued use of old name after retirement of partner.—An instructive case on this head is Newsome *v.* Coles. (*z*) There a firm of four partners carried on business under the name of Thomas Coles & Sons. Thomas Coles died, but the three sons carried on business in the old name for a few years; they then dissolved partnership, two of them establishing a new business and the other continuing the old business alone, but in the old name. The dissolution was advertised in the "Gazette." The plaintiff, who did not know of the dissolu-

(*y*) See, also, the American case, Thompson *v.* First National Bank of Toledo, 4 Davis Sup. Ct. 531.

26. What constitutes a holding out.—The person sought to be charged as a partner, on this ground of estoppel, must be shown to have *done something* calculated to create a belief that he was a partner, and to have misled the plaintiff. Pringle *v.* Leverich, 48 N. Y. Super. Ct. 90. This "holding out" may be by words spoken or written, or by conduct leading to the belief that a partnership exists. Cirkel *v.* Ellis, 31 N. W. Rep. 513; Harris *v.* Sessler, 3 S. W. Rep. 316. Thus, one who "represents himself as a partner," or permits others to do so (Daily *v.* Coons, 64 Ind. 545; Rice *v.* Barrett, 116 Mass. 312); or who so conducts himself in buying goods as to induce the belief that he is a member of the firm he buys for (Hancock *v.* Hintrager, 60 Iowa 374); or who knowingly permits his name to be used as a member of a firm (Campbell *v.* Hastings, 29 Ark. 512; Carmichael *v.* Grier, 55 Ga. 116), thereby incurs a partner's liability as towards those who are misled thereby.

So, also, the appearance by an individual, in an action against a partnership, who files a plea to the merits, takes an active part in the proceedings, and takes an appeal, is a conclusive admission that he is a member of the firm. McCaskey *v.* Pollock, 2 So. Rep. 674. And the act of a father in placing his infant son in a firm, as a partner, has been held to be such a taking part in the business on the part of the father as to make him liable to creditors as a partner in the firm. Miles *v.* Wann, 27 Minn. 56.

On the other hand, it has been held that entries in the books of a firm are not evidence against any one to show that he is a member of the firm (Abbott *v.* Pearson, 130 Mass. 191); and that a general manager of a firm who, duly authorized, uses the firm name in transacting its business, and signs it to a contract which he has personally concluded, is not liable as a partner unless he has affirmatively held himself out as such. Ihmsen *v.* Lathrop, 104 Pa. St. 365. So, also, a statement in a newspaper, to the effect that a certain person is a member of a certain firm, which does not purport to be inserted by the firm, is not admissible to charge the person referred to as a partner, merely on proof that he was a subscriber to the paper at that time, and never requested the editor to deny such statement. Potter *v.* Greene, 9 Gray (Mass.) 309. And evidence that A was a partner in a certain company in September, and, as such, signed contracts reciting a contract made by the company in March, is not competent in order to charge him upon a debt contracted by the company in July. Butler *v.* Henry, 3 S. W. Rep. 878.

(*z*) 2 Camp. 617.

tion, but had had no dealings with the firm before its dissolution, sought to make all three brothers liable on a bill accepted, after the dissolution, by the one brother, who continued to trade under the old name, and had accepted the bill in that name. The two other brothers, however, had never held themselves out to the plaintiff that they were partners in any firm of the name of Thomas Coles & Sons; they had done nothing to authorize the use of that name after the dissolution; at the same time they knew that the old name was still used, and they had taken no steps to prevent such use. This, however, it was held, they were not bound to do, and the plaintiff failed. The case would have been decided differently if the plaintiff had been a

*44] customer of the firm before its dissolution, for in that *case he would have been justified in supposing that there had been no change in the firm. (*a*)

Application of doctrine to inchoate partnerships, &c.—A person who holds himself out as willing to become a partner does not incur liability by so doing. Although a person who represents himself to be a partner is properly held liable as a partner to persons who have acted on the faith of his being so, it would be in the highest degree unjust to confound a representation by a person that he intended to become a partner, with a representation that he was one in point of fact, and to hold him as much liable to third parties for the one representation as for the other. This distinction was recognized and acted on in Bourne *v.* Freeth, (*b*) where the defendant, who had signed a prospectus containing the terms on which it was proposed to form a company, was held not to have held himself out as a shareholder therein.

"Holding out," a question of fact.—Whether a defendant has or has not held himself out to the plaintiff is in every case a question of fact, not a question of law, and the consequence is that there is great apparent conflict in the cases on this head. In Wood *v.* The Duke of Argyll, (*c*) and in Lake *v.* The Duke of Argyll, (*d*) the very same acts were relied on as a holding out, viz., being advertised as president of a society, acting as president at a meeting, and signing some resolutions then agreed upon. In the first case this was considered not sufficient

(*a*) See the note in 2 Camp. 620. See, also, Carter *v.* Whalley, 1 B. & Ad. 11, *infra*, book II., c. 2, § 3.

(*b*) 9 B. & C. 632. See, too, Reynell *v.* Lewis, 15 M. & W. 517, and Wyld *v.* Hopkins, Ib. Compare Martyn *v.* Gray, 14 C. B. (N. S.) 824.

(*c*) 6 Man. & G. 928.

(*d*) 6 Q. B. 477.

and the defendant had a verdict; whilst in the last it was considered to be sufficient and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the court in each case refused to disturb the verdict.[27]

Defendant held out by others.—The most difficult cases of this class occur where the defendant has not held *himself* out, but where he has been held out by others, and he alleges that they had no authority to do so. If they had no such authority he is not liable. (*e*) But express *authority is not necessary; authority may be inferred from [*45
his conduct; (*f*) and if a person has, by signing prospectuses, (*g*) or allowing his name to be put to them, (*g*) or by being party to resolutions, (*h*) or by his own statements, though not intended to be repeated, (*i*) or has in any other way so conducted himself as in fact to have authorized the holding out which he repudiates, he will not escape liability.[28]

Observations on the liabilities of promoters of companies, &c.—It cannot be too carefully borne in mind, in all cases of this description, that a person who is neither a partner nor a *quasi* partner, is liable on the general principles of agency for acts done by others, with his

27. See, also, Palmer *v.* Pinkham, 37 Me. 252; Chase *v.* Stevens, 19 N. H. 464.

(*e*) *Ante* p. 43, note (*u*).

(*f*) See the last two cases.

(*g*) Collingwood *v.* Berkeley, 15 C. B. (N. S.) 145.

(*h*) Maddick *v.* Marshall, 16 C. B. (N. S.) 387, and 17 Id. 829.

(*i*) Martyn *v.* Gray, 14 C. B. (N. S.) 824.

28. **Defendant held out by others.**—When one person permits another to hold him out as a partner, and thereby procures credit on the strength of his supposed relation, neither community of interest nor participation in the profits is necessary to render him liable as a partner. But, in order to render a person liable on this ground, he must have had knowledge that he was held out, or there must be circumstances from which notice can be imputed to him. Re Jewett, 7 Biss. (U. S.) 328; 15 Bankr. Reg. 126. S. P., Swann *v.* Sanborn, 4 Woods (U. S.) 625. In other words, one person cannot give himself credit as a partner of another, by holding himself out as such, without the consent, express or implied, of such other person (Crook *v.* Davis, 28 Mo. 94); and a person falsely held out as a partner without his knowledge, is not required to use diligence in ascertaining and contradicting the report. Campbell *v.* Hastings, 29 Ark. 512. See, also, Poillon *v.* Secor, 61 N. Y. 456.

But where two persons authorize a third to represent and hold himself out as their partner, and in pursuance thereof he does so, this is as much their holding themselves out as if the representations had been made by them in person. Hinman *v.* Little, 23 Mich. 484. See, also, on this subject, Hicks *v.* Cram, 17 Vt. 449.

authority, express or implied. If, therefore, directors, members of committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorize whatever may be done in pursuance of such resolutions, and they are the persons naturally looked to and *prima facie* liable to pay for what may be so done. (*k*) The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial, save that if a partnership can be established, the liability of one member for the acts of the others in the prosecution of their common object follows almost as a matter of course.

Holding out by retiring partner.—In cases where partners carry on business under a name which does not disclose who the partners are, the doctrine of holding out must be applied with care. Suppose A and B carry on business under the name of X & Co. Neither A nor B holds himself out as a member of that firm to any one who does not know their connection with it. (*l*) If, therefore, A retires from the firm, and gives no notice of his retirement, he will still be liable to old customers who knew of his connection with X & Co., and who

*46] continue to deal with it on *the faith that A is still a member of it; but A will incur no liability to new customers of X & Co. who never heard of him. (*m*) Further, if on A's retirement C joins B, and B and C carry on business as X & Co., even an old customer of X & Co., who goes on dealing with it without notice of A's retirement or C's admission, cannot truly say that A ever held himself out as partner with C, or with both B and C, and, consequently, even an old customer cannot maintain an action against A, B and C jointly for a debt contracted by X & Co. after A's retirement. The old customer can, in the case supposed, sue A and B on the ground that he dealt with X & Co. on the faith of A and B being still the members of that firm; or he can sue B and C on the ground that they are his real debtors; but he must elect between A and B on the one hand and B and C on the other; he cannot (in the case supposed) sue A, B and C on the ground that B and C are in truth X & Co., and that A is estopped from denying that he is a member of that

(*k*) See the cases in the last five notes, and Chapleo *v.* Brunswick Build. Soc., 6 Q. B. D. 696; Firbank's Exr. *v.* Humphreys, 18 Q. B. D. 54; Doubleday *v.* Muskett, 7 Bing. 110; Braithwaite *v.* Skafield, 9 B. & C. 401; Burls *v.* Smith, 7 Bing. 705.

(*l*) See Newsome *v.* Coles, *ante* p. *43.

(*m*) See Newsome *v.*Coles, *ante* p. *43.

firm. This was decided in Scarf *v.* Jardine. (*n*) This case would be otherwise if A and B carried on business in their own names, and A retired and C came in, and if B and C carried on business, with A's consent, under the name of A, B and C. In such a case A would hold himself out as in partnership with both B and C, and would be estopped from denying it as against any one dealing with the new firm on the faith of A being a member of it.

Further, if the old customer did not know of A's retirement, but did know that C had become a member of X & Co., such customer would, it is apprehended, be entitled to sue A, B and C jointly for a debt contracted by X & Co. after A's retirement and C's admission. (*o*)

Holding out by surviving partner.—If a partner dies and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased liable, even to old *customers or correspondents of the firm, for acts done by the survivors after the death of their late copartner. The [*47 doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name. (*p*) Even if the executor is the surviving partner using the old name, that will not make any difference; for although, as executor, he can give a lien on his testator's estate, ordinary debts contracted by him do not charge it. (*q*)[29]

(*n*) 7 App. Cas. 345. This case will be referred to hereafter when considering the liability of retired partners.

(*o*) Scarf *v.* Jardine is not an authority against this proposition, nor are Lord Selborne's observations in 7 App. Cas. 350, as the author understands them.

(*p*) See Webster *v.* Webster, 3 Swanst. 490; Devaynes *v.* Noble (Houlton's Case), 1 Mer. 616; Vulliamy *v.* Noble, 3 Mer. 614.

(*q*) See Farhall *v.* Farhall, 7 Ch. 123; Owen *v.* Delamere, 15 Eq. 134; but see Vulliamy *v.* Noble, 3 Mer. 614. See further on this subject, *infra*, book IV., c. 1, § 2.

29. Holding out by surviving partner.—Where a firm is dissolved by the death or retirement of one of the partners, it has been held that the evidence to support its continued existence as a universal partnership, alleged by a surviving partner, must be very clear. Gray *v.* Palmer, 9 Cal. 616. Surviving members of the firm who, after its dissolution, do not give themselves out to the world as commercial partners, are not bound *in solido* with those who do. Cooper *v.* Burns, 6 La. Ann. 740. Thus, the publication of an advertisement signed by A alone, announcing that "having bought the interest of B in the above business, I will continue it under the firm of A & Co., admitting C and D to interests from this date," is not alone sufficient to warrant the inference that C and D are admitted as partners. Appeal of Scull, 7 Atl. Rep. 588; followed Johnston's Appeal, 9 Id. 76; Ackroyd's Appeal, Id. 77; Sanquoit Silk Manuf. Co.'s Appeal, Id. 77.

Torts.—The doctrine of holding out only applies in favor of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it. (*r*) The doctrine is entirely misapplied when it is extended beyond the principle on which it rests. For example, it has no application to actions of tort arising from the negligent conduct of a firm where no trust has been put in it. In Stables *v.* Eley (*s*) a retired partner, whose name was on a cart, was held liable for the negligence of its driver. But although in that case there may have been evidence to go to the jury that the defendant was liable, proof by him that the driver was not his servant would have rendered him not liable.

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*SECTION III.—OF SUBPARTNERSHIPS.

*48]

A subpartnership is, as it were, a partnership within a partnership. It presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *subpartnership*, that is to say, it makes the parties to it partners *inter se*, but it in no way affects the other members of the principal firm.[30]

"*Socius mei socii socius meus non est.*"—In the language of civilians, "*Socius mei socii socius meus non est.*"(*t*) In Ex parte Barrow (*u*)

(*r*) See Scarf *v.* Jardine, 7 App. Cas. 357, and *ante* p. *42.

(*s*) Stables *v.* Eley, 1 C. & P. 614. See Pollock on Partn. (3d ed.) 25, where this blunder was first pointed out.

30. See Burnett *v.* Snyder, 43 N. Y. Super. Ct. 238, where the doctrine stated in the text is upheld, but where it is also decided that one who becomes a joint owner with a partner of his share in a partnership, standing in his name alone, with the knowledge and consent of all the members of the firm, is liable as a partner. See, also, Letzer *v.* Beale, 19 W. Va. 274. So, where the agreement of the stranger is not merely to share in the profits of one of the partners, but to share in the profits and losses of the business, he is a partner. Arquimbo *v.* Hillier, 49 N. Y. Super. Ct. 253.

(*t*) See Pothier on Part., § 91.

(*u*) 2 Rose 252.

Lord Eldon puts the law on this subject very clearly. "I take it," he says, "to have been long since established, that a man may become partner with A where A and B are partners, and yet not be a member of that partnership which existed between A and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." (*x*)

Liability to creditors.—Since the decision of the House of Lords in Cox *v.* Hickman (*ante* pp.*30–*35), a subpartner cannot be held liable to the creditors of the principal firm by reason of his participation in the profits thereof. (*y*)[31]

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*SECTION IV.—OF GENERAL AND PARTICULAR PARTNERSHIPS. [*49

Universal partnerships.—It is customary for writers on partnership law to livide partnerships into universal, general and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the Digest—"*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius*" (*z*)—and is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally

(*x*) See, too, Bray *v.* Fromont, 6 Madd. 5; Ex parte Dodgson, Mont. & Mac. 445.

(*y*) See, on this subject, the Scotch case of Fairholme *v.* Marjoribanks, 3 Ross' Lead. Cas. on Com. Law 697.

31. The rule stated in the text is the one in force in New York. Burnett *v.* Snyder, 81 N. Y. 550; S. C., 76 N. Y. 344; 45 N. Y. Super. Ct. 577; 43 Id. 238; but in Massachusetts it is held that where the agreement is that the stranger is to participate in the share of one of the partners of the profits of the firm, *as profits*, this renders him liable, as a partner, to the creditors of the firm, although, as regards the other members, he is not their partner. Fitch *v.* Harrington, 13 Gray (Mass.) 468. See, also, Bailey *v.* Clark, 6 Pick. (Mass.) 372.

(*z*) Dig. xvii., tit. 2 (*pro socio*), l. 5 pr.

from those in which they are partners in some particular transaction or adventure only. [32]

Partnership in one particular transaction only.—If persons who are not partners agree to share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else. (*a*) For example, if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further. (*b*) So, a partnership may be limited to the working of some particular patent, (*c*) or to the working of it in some particular place or district. (*d*) In all such cases as these the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships; (*e*) but such rights and liabilities are necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners depends entirely on the agreement into which they have entered and upon their conduct. [33]

32. **Universal partnerships.**—Where two brothers formed a partnership without written articles, and continued in partnership, greatly extending their business, and engaging in various enterprises, for thirty years or more—*Held*, that the partnership must be deemed a general and unlimited one; that all their property of every description was owned in common; and that the separate acts of one brother, however disastrous and unsatisfactory to the other, if done in good faith, were partnership transactions. Lyman *v.* Lyman, 2 Paine (U. S.) 11.

(*a*) See De Berkom *v.* Smith, 1 Esp. 29; Heyhoe *v.* Burge, 9 C. B. 431; Smith *v.* Watson, 2 B. & C. 401; see, as to partnerships in profits only, *ante* pp. *13, *14.

(*b*) Robinson *v.* Anderson, 20 Beav. 98, and 7 De G., M. & G. 239; McGregor *v.* Bainbrigge, 7 Hare 164.

(*c*) As in Lovell *v.* Hicks, 2 Y. & C. Ex. 481.

(*d*) As in Ridgway *v.* Philip, 1 Cr., M. & R. 415.

(*e*) See Reid *v.* Hollinshead, 4 B. & C. 867, and the cases cited in notes (*a*) and (*b*).

33. **Partnership in particular transaction.**—The rule that a partnership may exist in a single, as well as in a series of transactions (Kayser *v.* Maugham, 8 Colo. 232), has been applied in the following cases, in each of which it was held that such a partnership existed: Where there is a joint purchase, with a view to a joint sale and a communion of profit and loss. Re Warren, Daveis (U. S.) 320. Where two individuals purchase an article on joint account, and ship it. In such case they are liable for advances made for their joint concern. Felichy *v.* Hamilton, 1 Wash. (U. S.) 491. Where two agree to make a voyage jointly, each contributing time and services, and sharing in profits and losses (and freight earned in in the voyage cannot be reached by trustee process as the property of one of them

*50] *SECTION V.—OF CLUBS AND SOCIETIES NOT HAVING GAIN FOR THEIR OBJECT.

Societies not having gain for their object.—It follows from the propositions established in the foregoing pages that no partnership or *quasi* partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners.

Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts. It was held in Caldicott *v.* Griffiths (*f*) that the members of "The Midland Counties Guardian Society for the Protection of Trade" were not partners *inter se;* and in Flemyng *v.* Hector (*g*) that the members of the "Westminster Reform Club" were not partners as against third persons. (*h*) Such associations, although they consist of more than twenty members, need not be registered under the Companies acts, 1862. (*i*) It is a mere misuse of words to call such associations partnerships, (*j*) and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members

alone). Bulfinch *v.* Winchenback, 3 Allen (Mass.) 161. Where grain, received at a mill as toll, is mixed up, and becomes the subject of traffic between the defendants, each being part owner, and interested in the proceeds of the sale. Benson *v.* M'Bee, 2 McMull. (S. C.) 91.

On the other hand, in the following cases, the parties were held not to be partners, even in the particular transaction in question: Where two firms shared a certain venture, and kept a bank account in the name of one firm, adding the word "Co.," and so signed the checks. Re Warner, 7 Bankr. Reg. 47. Where two wool firms agreed to furnish each a stated proportion of a quantity of wool to be sold to a certain vendee, and to share profit and loss in the transaction. Snell *v.* De Land, 43 Ill. 323. Where there is a series of independent transactions wherein one finds money and buys lands selected by the other, profits being divided when the lands are sold again. Wells *v.* Atwater, 33 Minn. 83.

So, also, it is held that one who buys and ships for a firm of another city, using their funds, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner. Marsh *v.* Northwestern Ins. Co., 3 Biss. (U. S.) 351.

Evidence that defendants are not *general* partners or connected in business, is irrelevant and inadmissible, where the object is to charge them as partners in a single transaction. Schallenberger *v.* Seldonridge, 49 Pa. St. 83.

(*f*) 8 Ex. 898. See, too, R. *v.* Whitmarsh, 15 Q. B. 600; Bear *v.* Bromley, 18 Id. 271, as to their not requiring registration under the repealed act, 7 and 8 Vict., c. 110.

(*g*) 2 M. & W. 172.

(*h*) See, too, Todd *v.* Emley, 8 M. & W. 505; The St. James Club, 2 De G., M. & G. 383.

(*i*) Re Siddall, 29 Ch. D. 1. They may be wound up under the act, as will be seen in the volume on that subject.

(*j*) See *ante* p. *2. R. *v.* Robson, 16 Q.

themselves, (*k*) or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association. (*l*) [34]

**Societies in which each member acts for himself only.*—Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum. A policy so underwritten is neither more nor less than a number of separate contracts, whereby each underwriter agrees, on a given event, to pay the whole or a proportionate part of the sum written against his name. In such a society there is no joint stock; the mem- [*51

B. D. 137. In Lloyd *v* Loaring, 6 Ves. 773, the Caledonian Lodge of Freemasons, and in Silver *v.* Barnes, 6 Bing. N. C. 180, and Beaumont *v.* Meredith, 3 Ves. & B. 180, friendly societies were called partnerships. In Minnitt *v.* Lord Talbot, L. R Ir., 1 Ch. D. 143, persons who had advanced money to add to and improve a club were held to have a lien on the property for their money.

(*k*) As in Cross *v.* Williams, 7 Hurlst. & N. 675, where the commandant of a rifle corps was held liable for all uniforms he had ordered.

(*l*) Compare Flemyng *v.* Hector, 2 M. & W. 172, and Wood *v.* Finch, 2 Fost. & F. 447, where the agency was not established, with Luckombe *v.* Ashton, 2 Fost. & F. 705; Cockerell *v.* Aucompte, 2 C. B. (N. S.) 440; Burls *v.* Smith, 7 Bing. 705, and Delauney *v.* Strickland, 2 Stark. 416, where the agency was established. In Luckombe *v.* Ashton, and Burls *v.* Smith, the defendant was a member of the managing committee. This was not the case in Cockerell *v.* Aucompte, or Delauney *v.* Strickland. See, too, Thomas *v.* Edwards, 2 M. & W. 215

34. Societies and clubs.—Richmond *v* Judy, 6 Mo. App. 465; Lafond *v.* Deems, 81 N. Y. 507; Ash *v.* Guie, 12 Rep. 281; Ebbinghousen *v.* Worth Club, 4 Abb. (N. Y.) N. Cas. 300, note.

In Lafond *v.* Deems, *supra*, it was held that the accumulation of a fund by such a society, not in business, but in transactions incidental to its primary object, did not convert the society into a partnership.

So, also, in Michigan, it is held that an association the conditions of membership in which are payment of an entry fee and *pro rata* assessments, but which does no business involving profit and loss, is not a partnership; and the members are not personally liable on contracts made by its officers. Burt *v.* Lathrop, 52 Mich. 106. If, however, the members sanction or acquiesce in the creation of debts by the officers, they are liable for such debts. Devoss *v.* Gray, 22 Ohio St. 159. See, also, Ridgely *v.* Dobson, 3 W. & S. (Pa.) 118; Sproat *v.* Porter, 9 Mass. 300. Thus, where certain members of a club expressly authorized their president to execute a note in the name of the club, and for its use, which was done, such members became partners as to this particular transaction, and were each liable to the payee under the common name assumed by them. Ferris *v.* Shaw, 5 Mo. App. 279. So, individual members of a club are liable for work done with their concurrence or subsequent approval, where the credit was given to members of the club. Richmond *v.* Judy, 6 Mo. App. 465.

bers of it enter into no joint contract, but each is alone liable for any loss which may happen to the insured, according to the terms of the contract into which each for himself has entered. (*m*)

With respect to industrial and provident societies, see 39 and 40 Vict., c. 45.

SECTION VI.—OF CO-OWNERSHIP.

Co-owners not copartners.—No partnership necessarily subsists amongst persons to whom property descends, or is given jointly or in common; and even if several persons agree to buy property, to hold jointly or in common, although by the purchase they become co-owners, (*n*) they do not become partners unless that also was their intention. (*o*) [35]

(*m*) See Strong *v.* Harvey, 3 Bing. 304; Redway *v.* Sweeting, L. R., 2 Ex. 400; Gray *v.* Pearson, L. R., 5 C. P. 568; Andrews & Alexander's Case, 8 Eq. 176; and, as to suits between the members of such societies, Bromley *v.* Williams, 32 Beav. 177; Harvey *v.* Beckwith, 4 N. R. 90, 298; and 12 W. R. 819, 896.

(*n*) As to whether joint purchasers become tenants in common, or joint tenants, see Lake *v.* Gibson, 1 Eq. Cas. Ab. 290; Aveling *v.* Knipe, 19 Ves. 441; Crossfield *v.* Such, 8 Ex. 825; Harris *v.* Fergusson, 16 Sim. 308; Robinson *v.* Preston, 4 K. & J. 505; Bone *v.* Pollard, 24 Beav. 283; Harrison *v.* Barton, 1 J. & H. 287, in which the admissibility of parol evidence on the point was much discussed. In French *v.* Styring, 2 C. B. (N. S.) 357, *ante* p. *18, the race-horse was clearly held in common, the owners having become such at different times and by different titles.

(*o*) See Kay *v.* Johnston, 21 Beav. 536. Whether they intended to become partners or not may of course be doubtful, as in Sharpe *v.* Cummings, 2 Dowl. & L. 504, where two persons hired a field wherein to graze their cattle. This subject will be adverted to hereafter when treating of partnership property. Pothier has an appendix on the subject at the end of his essay on partnership; but the appendix is omitted from Mr. Tudor's translation of that essay. See further on this subject the last chapter in Story on Partnership.

35. **Co-owners not partners.**—The joint purchase of land by two or more persons does not make them partners, in the absence of an agreement to that effect, where such purchase is made for investment merely, each party paying his own proportion of the price. Chisholm *v.* Cowles, 42 Ala. 179. And the facts that a building is put up on the land so purchased, by one of the joint owners, with the consent of the owner (Sikes *v.* Work, 6 Gray (Mass.) 433), or that the joint owners build a mill and subscribe articles, framed for the purpose of regulating their common action in regard to the common property and the prosecution of the work (Pills-

*52] **Co-ownership and copartnership compared.*—Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows:

1. Co-ownership is not necessarily the result of agreement. Partnership is.[36]

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.[37]

3. One co-owner can, without the consent of the others, transfer his interest to a stranger so as to put him in the same position as regards the other owners as the transferrer himself was before the transfer. A partner cannot do this.[38]

4. One co-owner is not, as such, the agent, real or implied, of the others. A partner is.[39]

5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.

6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to

bury *v.* Pillsbury, 20 N. H. 90), or that one joint owner is to receive a fixed compensation per annum for his interest (McIlvaine *v.* Armfield, 5 La. Ann. 302), will not suffice to create the partnership relation between the co-owners, in the absence of an agreement to that effect.

36. Partnership and community are not to be confounded. The first is based on the contract of the parties, which thus creates the community; the last may exist independently of any contract whatsoever. Pickerell *v.* Fisk, 11 La. Ann. 277.

37. Where two bind themselves, the one to contribute land and stock for its cultivation, and the other personal skill, labor, and other stock, each to furnish a specified portion of the food for the animals, to pay equally the expenses of the plantation, and to divide equally the crops, they are partners, and not tenants in common. Autrey *v.* Frieze, 59 Ala. 587.

38. Where one of the partners in a firm formed for the purpose of buying and selling lands on speculation, after the concern has ceased active operations, transfers to an outsider one-half of the net profits of his share in the firm; the residue of his interest, together with the entire control and direction of his share, having been previously assigned to one of his copartners, in consideration of moneys advanced to him on account of it—this creates between the two assignees, not a partnership, but a tenancy in common in the share of their assignor; nor does it constitute the second assignee a partner in the firm. Cowles *v.* Garrett, 30 Ala. 341.

39. The purchase of land by two, jointly, does not give the one power to endorse for both, nor to accept a draft of the vendor in payment of the purchase money of the land. Schaeffer *v.* Fowler, 111 Pa. St. 451.

have it sold against their consent. A partner has no right to partition in specie, but is entitled on a dissolution to have the partnership property, whether land or not, sold, and the proceeds divided.[40]

7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst, as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies, by way of account and otherwise, which one co-owner *has against the others are in many important respects different from and less extensive than those which one partner has against his copartners. (*p*) [*53

Co-owners sharing profits.—When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference, if any, between them and partners becomes very obscure. The point to be determined is whether from all the circumstances of the case an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.

If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand, if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits, if not also in the property which yields them. Many perplexing cases may be imagined intermediate between those here put as examples, but the following illustrations will, it is hoped, enable the reader to appreciate the distinction in question.[41]

40. Although a purchase be on separate and not on joint account, yet if the interests of the purchasers are afterwards mingled with a view to a joint sale, a partnership exists from the time that the shares are so brought together. Rogers *v.* Nichols, 20 Tex. 719.

(*p*) See *infra*, as to this.

41. In Doak *v.* Swan (8 Greenl. (Me.) 170), four of the five tenants in common of a paper-mill, for the more convenient management of their business, agreed that one of them should be sole manager, foreman and bookkeeper, another should perform general labor in the mill, another should be engineer, and the fourth should "collect stock and market the paper," at fixed compensations to each. This was held to constitute a partnership between those who signed the agreement in the

Joint purchasers of goods for resale.—If several persons jointly purchase goods for resale with a view to divide profits arising from the transaction, a partnership is thereby created. (*q*) But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties as if they were. Coope *v.* Eyre (*r*) is a leading case in support of this proposition. There, an agreement was come to that one person should purchase oil and then divide it amongst himself and others, they paying him their proportion of the price. The oil was bought accordingly, and the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser purchased as a principal and not as an agent, and that as there was no community of profit or loss, the persons amongst

*54] whom the oil was to be divided could not be *made liable as partners or *quasi* partners. In Hoare *v.* Dawes (*s*) there was a similar agreement, and Lord Mansfield thought at first that there was a *quasi* partnership, but he and Willes, Ashhurst and Buller, JJ., ultimately decided that there was not, there being no agreement to share profit or loss, and there being no pretence for holding the purchasers liable for the acts of each other by reason of their holding themselves out as partners.

So, in Gibson *v.* Lupton, (*t*) two persons joined in the purchase of some wheat, with the intention of dividing and paying for it equally, and it was held that as there was no joint interest in profit or loss, they could not be considered partners, either as between themselves or as regarded third parties. 42

business of making and selling paper; and a promissory note given for stock, in the name of the company, by the party appointed to the charge of that department, was held binding on all the parties to the agreement.

(*q*) Reid *v.* Hollinshead, 4 B. & C. 867.

(*r*) 1 H. Bl. 37.

(*s*) 1 Doug. 371.

(*t*) 9 Bing. 297.

42. Joint purchasers of goods for resale.—Where two joint owners of merchandise consign it for sale, informing the consignee that each owns a moiety, giving separate and different instructions, each for his own share, their interests are severed; and each may maintain an action in his own name against the consignee for a violation of his instructions. Hall *v.* Leigh, 8 Cranch (U. S.) 50.

In Goell *v.* Morse (126 Mass. 480), two persons bought a horse, each paying half the price, under an agreement that when either should have possession of the horse he should provide for his keeping without cost to the other, and that each should try to sell the horse and endeavor to procure a purchaser at a profit over his cost, but

Part owners sharing the produce of their property.—Moreover, part owners who divide what is obtained by the use or employment of the thing owned are not thereby constituted partners. For example, if two tenants in common of a house let it and divide the rent equally amongst them, they are not partners, although they may pay for repairs out of the rent, before dividing it. (*u*) So, two persons who are tenants in common of a race-horse, and share his winnings on the one hand and the expenses of his keep on the other, are not partners, but co-owners only. (*x*) So, part owners of ships are not usually partners, (*y*) although they may be partners as well as part owners, as was the case in Campbell *v.* Mullett. (*z*) [43]

Co-owners of mines.—So, again, with respect to mines and quarries. Tenants in common or joint tenants of a mine or quarry may or may not be partners, and the mine or quarry itself may or may not be part of a common stock. But it is highly inconvenient, if not altogether

that neither should sell without the concurrence of the other. It was held that they were tenants in common of the horse, and not partners.

(*u*) See per Willes, J., in the case cited in the next note. See, also, Lyon *v.* Knowles, 3 B. & Sm. 556, where the gross receipts of a theatre were divided; and London Financial Assoc. *v.* Kelk, 26 Ch. D. 107.

(*x*) French *v.* Styring, 2 C. B. (N. S.) 357; *quære*, whether there was in this case a partnership in the *profits?* It would seem not; the agreement being to divide the winnings as gross returns. See *ante* p. *18.

(*y*) Helme *v.* Smith, 7 Bing. 709; Ex parte Young, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose 76; Green *v.* Briggs, 6 Hare 395.

(*z*) 2 Swanst. 551. See Id., p. 575.

43. Sharing proceeds or earnings of joint property.—A joint interest in a patent does not confer upon the parties the character of partners. Parkhurst *v.* Kinsman, 1 Blatchf. (U. S.) 488; Pitts *v.* Hall, 3 Id. 201; Hermanns *v.* Duvigneaud, 10 La. Ann. 114. So, also, the joint purchase, by two persons, of a threshing machine to be used in common, in payment for which they give to the seller their joint note, renders them joint owners, not partners. Iliff *v.* Brazill, 27 Iowa 131.

Joint owners of ships.—It is well settled that joint ownership of a vessel or cargo, in distinct proportions, without any agreement to share in the profit or loss which may ultimately arise, will not make the co-owners copartners in the property or voyage, but tenants in common. Thorndike *v.* De Wolf, 6 Pick. (Mass.) 120; Merrill *v.* Bartlett, Id. 46; French *v.* Price, 24 Id. 13; Phillips *v.* Purington, 15 Me. 425; Ward *v.* Bodeman, 1 Mo. App. 272; Holmes *v.* United States Ins. Co., 2 Johns. (N. Y.) Cas. 329; Hopkins *v.* Forsythe, 14 Pa. St. 34; Jackson *v.* Robinson, 3 Mason (U. S.) 138.

Thus, the owners of whale ships, in the absence of special agreements to that effect, are not partners, but tenants in common; the other owners are not liable to contribute according to their shares to one of their number who has been obliged to pay more than his share in fitting out the vessel. Macy *v.* De Wolf, 3 Woodb. & M. (U. S.) 193.

As to what acts of part owners of a ves-

impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the *profits of the mine; and persons who work a mine or quarry in common [*55 are regarded rather as partners in trade than as mere tenants in common of land. (*a*) 44

Three cases have here to be considered:

1. *Co-owners partners in profits and in mine.*—The co-owners may be partners, not only in the profits, but also in the mine itself. The co-owners are then partners to all intents and purposes, and their mutual rights and obligations are determined by the law of partnership as distinguished from the law of co-ownership. (*b*)

2. *Co-owners not partners at all.*—The co-owners may not be partners at all, neither in the profits nor in the mine. Their mutual rights and obligations are then determined by the law of co-ownership as distinguished from the law of partnership. In this case each owner is entitled to an account of what the others have got from the mine more than their share; (*c*) and to transfer his share in the mine without the consent of the other owners; (*d*) and to have a partition made of the mine between him and them. But the writer conceives that in the case now supposed no owner is entitled to have the mine sold against the consent of the others. (*e*) Whether, if the co-owners cannot agree as to the mode of working the mine, an action will lie for

sel will render them liable to be sued as partners, see Bacon *v.* Cannon, 2 Houst. (Del.) 47.

(*a*) See Jefferys *v.* Smith, 1 Jac. & W. 298; Crawshay *v.* Maule, 1 Swanst. 495; Fereday *v.* Wightwick, 1 R. & M. 45.

44. **Co-owners of mines.**—Where three persons agreed to operate together a "mining property as a company," this creates a partnership between them from the date of the agreement, and makes each of the three liable for debts contracted in the prosecution of the enterprise, notwithstanding a further provision in their agreement that there shall be no division of profits until two of the three are reimbursed, out of the profits, for money expended by them in the purchase of their shares of the property from the other one, and the cost of improving the same. Bybee *v.* Hawkett, 12 Fed. Rep. 649; S. C., 15 Cent. L. J. 105; 8 Sawy. (U. S.) 176.

(*b*) There is no authority for saying that in this case one of the partners can, in the absence of a special agreement or custom, assign his share without the consent of the other partners. That in this case the right is to a sale, and not to a partition of the mine, see Wild *v.* Milne, 26 Beav. 504; Crawshay *v.* Maule, 1 Swanst. 495; Lees *v.* Jones, 3 Jur. (N. S.) 954.

(*c*) Denys *v.* Schuckburgh, 4 Y. & C. Ex. 42.

(*d*) Bentley *v.* Bates, 4 Y. & C. Ex. 182.

(*e*) *I. e.*, except under the act 31 and 32 Vict., c. 40, enabling a sale to be made in lieu of partition. See Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479.

the appointment of a receiver and manager, is not settled. Lord Eldon, in Jefferys *v.* Smith, (*f*) is generally understood to have intimated that it will; but the case before him was not of the description now under discussion, being one in which the mines were worked in partnership; and in a recent and care *fully considered case the contrary rule was treated as more correct. (*g*)

*56]

3. *Co-owners partners in profits only.*—The co-owners of a mine may work it together, bring the produce into a common fund, and be partners in the profits of the mine, but not in the mine itself. In this case the mutual rights and obligations of the owners are determined partly by the law of partnership and partly by the law of co-ownership, and some curious anomalies are the consequence. The most important of these are as follows:

1. Each co-owner may transfer his interest in the mine and in the partnership working it without the consent of the other owners. (*h*)

2. Each co-owner is entitled to maintain an action for an account against the others without seeking for a dissolution of the partnership. (*i*)

3. Upon a dissolution of the partnership, the mine itself, not being partnership property, must be divided between its several owners and not be sold, (*k*) unless under the statute enabling sales to be made in lieu of partition. (*l*)

4. As between the real and personal representatives of a deceased partner, his share of the mine will be real, and not personal estate. (*m*)

5. With a view to a dissolution, the court will, if necessary, appoint a receiver and manager to carry on the mine for the benefit of all parties interested. (*n*)

(*f*) 1 Jac. & W. 302. Wynget *v.* Heathcote, cited in 4 Y. & C. Ex. 187, supports the same view, but the circumstances of the case are not sufficiently known.

(*g*) Roberts *v.* Eberhardt, Kay 148. Where the mine has been worked in partnership, and the partnership has been dissolved, and the mine ordered to be sold, an *interim* receiver and manager will, if necessary, be appointed, Lees *v.* Jones, 3 Jur. (N. S.) 954.

(*h*) Bentley *v.* Bates, 4 Y. & C. Ex. 182; Crawshay *v.* Maule, 1 Swanst. 517-519.

(*i*) Bentley *v.* Bates, 4 Y. & C. Ex. 182.

(*k*) Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479. A sale was decreed in the cases referred to, *ante* note (*b*), but in them the mine was a partnership asset. Consider the analogous case of a ship.

(*l*) 31 and 32 Vict., c. 40.

(*m*) Steward *v.* Blakeway, *ubi sup.*

(*n*) Roberts *v.* Eberhardt, Kay 148; Lees *v.* Jones, 3 Jur. (N. S.) 954; Jefferys *v.* Smith, 1 Jac. & W. 302; Rowe *v.* Wood, 2 Id. 553; Wynget *v.* Heathcote, cited 4 Y. & C. Ex. 187. Whether a receiver and manager will be appointed if no dissolution is sought, see the judgment in Roberts *v.* Eberhardt.

6. The obligation of each co-owner to account to the *others is the same as that of one partner to account to his copartners, [*57 and much more extensive, therefore, than the obligation which exists in a case of mere co-ownership. The lien which each partner has on the shares of his copartners for what is due from them to the partnership extends to cases of this third class, (*o*) as does also the obligation which one partner is under to account to his copartners for benefits he may have received in respect of the common property. It has been decided that where two tenants in common of a mine construct a shaft at their own expense in land belonging to one of them exclusively, money paid by a stranger for the use of that shaft belongs to both tenants, and not exclusively to him in whose land the shaft is constructed. (*p*)

Note on the remedies available by one co-owner against the others.

In order still further to understand the differences between co-ownership and copartnership, it is necessary to compare the rights and remedies of co-owners against each other with the corresponding rights and remedies of partners. The rights and remedies of partners *inter se* will be fully investigated hereafter; but as there is no compendious summary of the rights and remedies of co-owners *inter se*, the following note is here appended.

The obligation of a partner to account with his copartner arises *ex contractu*, and this obligation is not confined to the partners themselves, but devolves, with its correlative right, upon their respective representatives. The obligation of one co-owner to account with the other for the profits which may have arisen from the common property cannot be based upon contract where no contract has been entered into; but it by no means follows that because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can and to keep what he may get. This was seen plainly enough by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by himself, and to contribute with them to the expenses properly incurred for the common benefit. (*q*) Our ancestors, however, seem to have taken a different view of the matter.

*58] *By the strict rule of the common law, one co-owner of land was entitled to no account from another unless the former had made the latter his bailiff, or had been actually ousted from the land; (*r*) and one co-owner of a chattel had no remedy

(*o*) Fereday *v.* Wightwick, 1 R. & M. 45; Roberts *v.* Eberhardt, Kay 148; Crawshay *v.* Maule, 1 Swanst. 495.

(*p*) Clegg *v.* Clegg, 3 Giff. 322.

(*q*) See Inst., lib. 3, tit. 27, §§ 3–5; and Dig., lib. X., tit. 2, l. 25, § 16, and tit. 3, l. 4, § 3, and lib. XVII., tit. 2, l. 34.

(*r*) See Co. Lit. 200.

against another, unless he had destroyed the common property. (*s*) The statute 4 Anne, c. 16, § 27, has placed co-owners of land in a somewhat better position than they were in before, by enacting that an action of account may be maintained by one co-owner against another for receiving more than his share; but nothing has been done to improve the law as to co-owners of chattels except by the introduction, by equity judges, of rules founded on the principles of the Roman law.

The inadequacy of the remedies available by one co-owner against another at common law is justified by early writers upon the ground that each tenant in common has it in his own power to enter on the common property, if it be land, and to get possession of the common property, and retain it, if it be an ordinary chattel; and, according to the writers in question, it is only when one co-owner prevents the other from entering in the first case, and, by destroying the chattel, from getting possession of it in the other, that there is any necessity for having recourse to an action. (*t*) The unsatisfactory nature of this reasoning is too apparent to require comment; for, admitting its force in the case of land, it is plainly in the highest degree unjust to allow one co-owner of a valuable chattel to keep it exclusively in his own possession, and to tell the other that his only remedy is to take it peaceably when he sees his time, and, having got it, to be careful not to part with it. Unsatisfactory, however, as the reasoning is, it affords the only explanation of the actual state of the law upon the subject under consideration.

In order to understand accurately the remedies, which by the law of this country are available for one co-owner against another, it is necessary, in the first place, to distinguish land from chattels.

1. *With respect to land.*

1. *Co-owners of land.*—If land is owned by several persons, jointly or in common, each is entitled to enter upon and occupy it. (*u*)

2. If any one of them is actually excluded by the others, he can bring an action for the recovery of his undivided share; (*x*) and, having recovered, he can sue for mesne profits; (*y*) and, in an action for them, the jury are not bound to confine the damages to the value of the actual profits made by the defendant. (*z*) In cases of actual exclusion or destruction, an action for *damages will also lie by one co-owner against the other; (*a*) and now an injunction and a receiver can be [*59 obtained, even although there is no actual exclusion. (*b*)

3. Subject to the provisions of the act of 31 and 32 Vict., c. 40, one co-owner of land is entitled to have it divided between himself and the other owners, although they may not desire a partition. (*c*)

(*s*) Ib.

(*t*) See Lit., § 323.

(*u*) Lit., § 323. One is not entitled to a receiver as against the others if they do not exclude him. Sandford *v.* Ballard, 30 Beav. 109. See *infra*, note (*b*).

(*x*) Lit., §§ 322, 323, and Coke's comments upon them. As to evidence of actual exclusion, see Doe *v.* Prosser, Cowp. 217; Jacobs *v.* Seward, L. R., 5 H. L. 464.

(*y*) Goodtitle *v.* Tombs, 3 Wils. 118.

(*z*) Ib.

(*a*) Cresswell *v.* Hedges, 1 H. & C. 421, where the defendant paid money into court in respect of the damage to the plaintiff's share.

(*b*) See Jud. Act, 1873, § 25, cl. 8. Porter *v.* Lopes, 7 Ch. D. 358; Sandford *v.* Ballard, 33 Beav. 401.

(*c*) See Bac. Ab., "Joint Tenants," I, 7, and Agar *v.* Fairfax, 17 Ves. 533, and the notes to it in 2 White & T. Lead. Cas.

4. If one co-owner makes the other his bailiff or receiver, the latter can be compelled to account, not only for what he has received, but also for what he might have received without his own willful default. (*d*)

5. And by the statute of Anne (4 Anne, c. 19, § 27), one co-owner who receives more than his share can be made to account to the other owners for what he has received more than he ought. (*e*)

6. But it has been decided, since the passing of this statute, that one co-owner of land, who merely occupies the whole, is not liable to pay any rent to the other owners. (*f*)

7. And it has also been decided that if one co-owner not only occupies the whole land, but expends his own industry and capital upon it, and thereby realizes profit (*e. g.* by farming), he is not liable to account to his co-owners for any share of such profit. (*g*)

8. But if one co-owner of land derives gain, not from the mere use of the land by himself, but by being paid for the use thereof by others, he must account to the other owners for what he receives beyond his own share. (*h*)

9. *A fortiori*, if one co-owner of land derives gain by wasting the common property, he is liable to account to the other owners for their shares of the money so obtained. (*i*) He can also be restrained by a co-tenant from committing destructive waste, (*k*) but not from cutting timber in a *proper and judicious manner; nor, it is conceived, from mining in a similar way. (*l*)

*60]

10. If one of several joint tenants or tenants in common of a house lays out money in necessary repairs, his outlays will be taken into account upon a partition or sale; (*m*) but he cannot enforce contribution by an action for damages; (*n*) nor has he any lien on the house or on the interest of his cotenants therein for their shares of the expense. (*o*) [45]

(*d*) Co. Lit. 200 *b*, and 172 *a*.

(*e*) The remedy at law was by an action of account and not by an action for money had and received. Thomas *v.* Thomas, 5 Ex. 28; Jacobs *v.* Seward, L. R., 5 H. L. 464.

(*f*) Teasdale *v.* Sanderson, 33 Beav. 534; Wheeler *v.* Horne, Willes 208; M'Mahon *v.* Burchell, 2 Ph. 127. But see Drury *v.* Drury, 1 Ch. 49. In Turner *v.* Morgan, 8 Ves. 145, there was exclusion. Where one of the co-owners is an infant, see Pascoe *v.* Swan, 27 Beav. 508.

(*g*) Henderson *v.* Eason, 17 Q. B. 701, and 2 Ph. 308; Jacobs *v.* Seward, L. R., 5 H. L. 464.

(*h*) Henderson *v.* Eason, 17 Q. B. 701. See, too, Clegg *v.* Clegg, 3 Giff. 322, *ante* p. *57, note (*p*); Carter *v.* Horne, 1 Eq. Cas. Ab. 17, as to sharing benefits derived by one.

(*i*) Co. Lit. 200 *b*; Martyn *v.* Knowllys, 8 T. R. 145. See the last sentence in the judgment. See, as to injunctions to restrain waste, Twort *v.* Twort, 16 Ves. 128.

(*k*) Arthur *v.* Lamb, 2 Dr. & Sm. 428; Wilkinson *v.* Haygarth, 12 Q. B. 837.

(*l*) Arthur *v.* Lamb, 2 Dr. & Sm. 428; Wilkinson *v.* Haygarth, 12 Q. B. 837.

(*m*) See Leigh *v.* Dickeson, 15 Q. B. D. 60.

(*n*) Ib., where the passages in Co. Lit. 200 *a*, and F. N. B. 162, and the old writ of contribution, are explained.

(*o*) Re Leslie, 23 Ch. D. 552. See, also, Kay *v.* Johnston, 21 Beav. 536; Teasdale *v.* Sanderson, 33 Beav. 534.

45. In an action by one of two tenants in common of land, against the other, to recover one-half the plaintiff's outlay for taxes and improvements made during the absence of the defendant, the principal rights and duties of the parties, implied

2. *With respect to chattels.*

Co-owners of chattels.—Ships are by far the most important chattels usually owned in common. But great care is required in applying the rules which govern ships to other chattels; for, in the first place, the principles enforced in the Court of Admiralty differ in many important respects from those by which the ordinary courts are governed; and, in the next place, the stringent provisions of the ship registry acts have frequently rendered it impossible to apply to ships those general doctrines of equity which are applicable to other kinds of property. For the purpose, therefore, of avoiding error in pursuing the present subject of inquiry, ships must be distinguished from other chattels.

1. *Ships.*—A considerable portion of the law which regulates the mutual rights and obligations of part owners of ships is based upon the assumption that it is particularly for the benefit of the public that ships should not lie idle. (*p*) Hence it is that a majority of the part owners of a ship can employ her against the will of the others, upon giving them security to the value of their shares; (*q*) a course which cannot be taken by a majority of the part owners of any other chattel. Where a ship is sent on a voyage by some of the part owners against the will of the others, the dissentients are not entitled to share the profits of the voyage, (*r*) nor are they liable to contribute to its losses. (*s*) But where a ship is employed by all the part owners, or by some of them, but not against the will of the others, (*t*) they all share her gross earnings, and contribute to the expenses incurred in obtaining them; and in such a case there is little if any difference between the account which is taken between the part owners and that which would be taken if they were actually partners.

*Before any division of profits amongst the part owners, the gross freight or earnings of the adventure must be applied in payment of the expenses of the voyage yielding them, including the costs of repairs and outfit for that voyage. (*u*) Lord Hardwicke went further, and held that each part owner had a lien on the ship [*61

by the law from their relation as tenants in common, were held to be as follows: The right of partition, when either desires it; the right of mutual participation of the fruits and revenues, and the consequent duty to account to each other therefor; the duty of the co-proprietor, who is present, and in actual possession, to take the same care of the property as if it were wholly his own; and the right of incurring expenses necessary for the preservation of the common property, and consequent obligations of reimbursing one another for such outlays. The court further said that where one of the proprietors makes some change in the property, in the other's absence, unnecessary for its preservation, occasioning loss to his cotenant, or which he has just cause to disapprove of, the former does so at his own risk and under the obligations of an equitable restoration. The relation is not a partnership, but is controlled in some respects by analogous rules. Smith *v.* Wilson, 10 La. Ann. 257.

(*p*) See Maclachlan on the Law of Merchant Shipping (2d ed.), p. 90.

(*q*) Id., p. 94.

(*r*) Anon., 2 Ch. Cas. 36; Davis *v.* Johnston, 4 Sim. 539.

(*s*) Horn *v.* Gilpin, 1 Amb. 255. Davis *v.* Johnston, 4 Sim. 539, is not opposed to this. The marginal note, however, is calculated to mislead.

(*t*) Strelley *v.* Winson, 1 Vern. 296, as corrected by Horn *v.* Gilpin, 1 Amb. 255.

(*u*) Green *v.* Briggs, 6 Hare 395; Lindsay *v.* Gibbs, 22 Beav. 522, and 26 Id. 51, and 3 De G. & J. 690; Alexander *v.* Simms, 18 Beav. 80, and 5 De G., M. & G. 57.

itself, and on the proceeds of its sale for the balance due to him from the other owners on the joint account, and had a right to a sale of the ship as if it were partnership property. (*x*) But Lord Eldon thought this was going too far, and he reversed Lord Hardwicke's decision, and it is now settled that there is no such lien or right. (*y*) Lord Eldon's view, however, has not prevailed in America. (*z*)

Other chattels.—Passing from ships to other chattels, the position of a part owner not in possession was at law most disadvantageous; for, first, he could not obtain possession otherwise than by taking the thing itself if he had the chance; (*a*) second, he could not obtain the value of his share unless the thing had been actually or virtually destroyed; (*b*) and, third, these rules applied as well to the produce of the thing as to the thing itself. (*c*) Whether, if one tenant in common of a chattel sold it, the other had any remedy at law for his share of the money produced by the sale, was doubtful, (*d*) unless the sale had conferred a good title to the entirety upon the purchaser, when a remedy clearly existed. (*e*)

The obligation of a co-owner of a chattel to account for the gain which he might have derived from its use may therefore be said to have been hardly, if at all, recognized at law. In equity the case was otherwise, but it is surprising how little direct authority there is upon the subject of co-ownership, if the decisions relating to ships and the winding up of partnerships are excluded from consideration. The principles, however, upon which these decisions are based may safely be applied to other cases if the anomalies introduced by the ship registry acts, and the fact that the rights of partners and those claiming under them depend upon contract, are borne in mind.

When the profits derived by one part owner of a chattel are not attributable to his own industry and exertions, but are simply what he receives from others in respect of it (*e. g.*, dividends of stock, or shares, or money paid for hire)—or where the profits are produced in the ordinary *course of nature (*e. g.*, by breeding)—there is
*62] no difficulty in coming to the conclusion that his co-owners are entitled to make him account to them for their shares of what their property may have produced. Further, when one co-owner of a chattel derives gain from its use, and those gains are attributable, mainly or in part, to his own industry and exertions, justice to the other owners and to him requires either that the gains made by him shall be shared by all, they making him a proper allowance for his trouble and reimbursing him his expenses, or that he shall be allowed to keep the whole profits, paying the other owners a proper sum for the use of their property. Of these two modes of adjusting the rights of the parties, the first seems to be most in accordance with the course

(*x*) Doddington *v.* Hallet, 1 Ves. Sr. 497, and see Attorney-General *v.* Borrodaile, 1 Price 148, and per Lord Eldon, 2 Ves. & B. 243.

(*y*) Ex parte Young, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose 76.

(*z*) See Story on Part., § 444.

(*a*) Lit., § 323, and see 2 Wms. Saund. 47 *o*.

(*b*) Co. Lit. 200; Jacobs *v.* Seward, L. R., 5 H. L. 464.

(*c*) See Fennings *v.* Grenville, 1 Taunt. 241, where a whale had been converted into blubber and oil.

(*d*) See Heath *v.* Hubbard, 4 East 110; Mayhew *v.* Herrick, 7 C. B. 229; Morgan *v.* Marquis, 9 Ex. 145; Barton *v.* Williams, 5 B. & A. 395; and Williams *v.* Barton, 3 Bing. 139.

(*e*) See Jacobs *v.* Seward, L. R., 5 H. L. 464, and the cases in the last note, and per Willes, C. J., in Wheeler *v.* Horn, Willes 208.

usually adopted in analogous cases. Notwithstanding, therefore, the little direct authority upon the point, the writer ventures to submit that as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners for their respective shares, he being allowed all proper charges and expenses. (*f*) [46]

Co-owners of patents and copyrights.—Cases may, nevertheless, arise in which justice may be done by allowing each co owner to make what he can and to keep what he may get. This may occur where the chattel is such that each co-owner can, in fact, enjoy his rights to the full extent, without the concurrence of the other owners (*e. g.*, where the chattel is a patent for an invention). In the case of a patent, belonging to several persons in common, each co-owner can assign his share and sue for an infringement, (*g*) and can also work the patent himself, and give licenses to work it, and sue for royalties payable to him for its use; (*h*) and it is now settled that he is entitled to retain for his own benefit whatever profit he may derive from the working, although it is perhaps still open to question whether he is not liable to account for what he receives in respect of the licenses. (*i*) The mutual rights of co-owners of a copyright, not being partners, have not been much discussed; but it has been decided that a license to represent a dramatic entertainment granted by one only of several co-owners of the copyright in it, does not bind the others; nor prevent them from recovering their shares of the penalties imposed by statute on persons who infringe the copyright. (*k*)

If part owners of an ordinary chattel cannot agree who ought to have it, or how it ought to be employed, the only remedy (if any) appears to be by an action for an injunction or a receiver and a sale. (*l*)

(*f*) See the judgment of Wigram, V. C., in Green *v.* Briggs, 6 Hare 395, and Strelley *v.* Winson, 1 Vern. 297. See, also, 1 Story's Eq. Jur., § 466.

46. In an early Pennsylvania case it is held that joint purchasers, without an agreement of partnership, are not entitled to the remedies nor subject to the responsibilities of partners. Brady *v.* Calhoun, 1 Pa. 140. Thus, two joint owners of a horse who enter into a written contract, by which one is to keep the horse for a certain time at a certain price, half of which is to be paid by the other, are not partners, although so calling themselves in the contract, and an action will lie on the contract by one against the other. Oliver *v.* Gray, 4 Ark. 425.

(*g*) See Dunnicliff *v.* Mallet, 7 C. B. (N. S.) 209, and Walter *v.* Lavater, 8 Id. 162. As to tenants in common of trade-marks, see Dent *v.* Turpin, 2 J. & H. 139.

(*h*) Sheehan *v.* Great East. Rail. Co., 16 Ch. D. 59.

(*i*) Mathers *v.* Green, 1 Ch. 29, reversing S. C., 34 Beav. 170. The same point was discussed, but not decided, in Hancock *v.* Bewley, Johns. 601. See, also, Russell's Patent, 2 De G. & J. 130; Horsley *v.* Knighton's Patent, 8 Eq. 475.

(*k*) Powell *v.* Head, 12 Ch. D. 686. See some observations on the indivisibility of copyright in 4 H. L. Cas. 992.

(*l*) See Jud. Act, 1873, § 25, cl. 8.

*CHAPTER II. [*63

OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP.

Consideration for a partnership.—Agreements to share profits, like all other agreements, require to be founded on some consideration in order to be binding. Any contribution in the shape of capital or labor, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement. (*a*)

A *bona fide* contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter.

As observed by Vice Chancellor Wigram, "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the court to measure the *quantum* of value. The parties must decide that for themselves." (*b*)[1]

(*a*) See The Herkimer, Stewart's Adm. Rep. 23; Anderson's Case, 7 Ch. D. 75.

(*b*) Dale *v* Hamilton, 5 Hare 393.

1. **Sufficiency of the consideration.**—Consent to continue a partnership is a sufficient consideration for a promise by the other partner to pay to the one so consenting a portion of the profits. Emery *v.* Wilson, 79 N. Y. 78.

When an agreement to become stockholders in a partnership, in specified shares, and to pay the amount subscribed, is signed by several persons with the number of shares and the aggregate amount thereof annexed to their names, although no promisee is named in the agreement, each party, in effect, promises to the others to pay the amount; and the promises of the others are a consideration for the promise of each. Kimmins *v.* Wilson, 8 W. Va. 584. And when such subscribers organize a company and appoint a treasurer, and, pursuant to agreement, one makes a promissory note, payable to the one appointed treasurer, for his unpaid share, the previous liability and agreement constitute an adequate consideration for the note. Ib.

Where the consideration of the contract of partnership consisted of the mutual covenants and promises of the partners, and the acts they respectively engaged to perform, although the business of the partnership was the buying and selling of slaves, it cannot be said that the consideration of the contract was the purchase of slaves. Belcher *v.* Conner, 1 So. Car. 88.

On the other hand, it is held that a partnership agreement in which one of the partners promises to give the other partner an equal interest in the profits of the enterprise, without any thing being fur-

Profits to be shared, but losses not.—It often happens that persons agree that all profits shall be shared ratably, and, nevertheless, that all losses shall be borne by some or one of them exclusively. Such an agreement is not necessarily invalid as a *nudum pactum*, for it is nothing more than an agreement providing, amongst other things, that some or one of the partners shall indemnify the others against losses; and the very fact that these latter become, or agree to become, partners, is quite sufficient consideration to give validity to a contract that they shall be indemnified. Such agreements appear, moreover, to be reasonable where the partners *indemnified leave the whole management of the concern to their copartners. (c)[2]

*64]

nished by the latter to accomplish the object of the copartnership, is without mutuality and accordingly is void. Mitchell *v.* O'Neale, 4 Nev. 504.

An agreement between two physicians, F. and S., provided for an equal division of the gross receipts of their joint business in a certain town. F. might be absent six months in the year, or for any remaining portion thereof. S. might be absent when he pleased, but neither, if absent more than two days at a time, should have any part of the income derived from the business of the other during such absence. Before either should withdraw from the contract, any horse or carriage purchased for the joint business should be sold, and the loss sustained by the party withdrawing. If F. should withdraw and cease to do business in that town, without having shared the benefit of the business at all, then S. was to pay him a certain sum. *Held*, that so long as the contract was executory, there was no evidence of any consideration for the agreement to pay the sum mentioned, apparent on the face of the contract itself. Frothingham *v.* Seymour, 118 Mass. 489.

(*c*) Geddes *v.* Wallace, 2 Bligh 270, is an instance of such an agreement. However, in Brophy *v.* Holmes, 2 Moll. 1, Lord Chancellor Hart expressed an opinion that an agreement between A and B that A should advance capital, that B should be sole manager, and that they should divide the profits equally, but that all losses should fall on B, was, as regards the last stipulation, void as being *nudum pactum*; and his lordship thought that under such an agreement the losses should be borne equally. But see, as to such partnerships, *ante* pp. *15, *et seq.*

2. Sharing profits only.—While, as a general rule, a partnership presupposes a communion of profits and losses among all the members of the firm, still a disproportionate interest in profits and losses may be agreed upon, and such a partnership agreement will be enforced. Weldon *v.* Beckel, 10 Daly (N. Y.) 472. Thus, an agreement by which one participates in the profits only of a business renders him a general partner as to third persons. Claflin *v.* Hirsh, 19 Week. Dig. (N. Y.) 248. And a stipulation exempting a partner from losses for a fair and just equivalent is valid as to the partners *inter se*. Consolidated Bank *v.* State, 5 La. Ann. 44.

Where two agree to be partners in a business in which they are engaged together they become partners, though one of them receives no part of the profits. Le Roy *v.* Mathewson, 47 N. Y. Super. Ct. 389.

Articles of partnership between A and B provided that A should have and bear forty-five per cent. and B twenty-five per cent. of the profits and losses, and that

Of the return of premiums.

Premiums.—It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium, *i. e.*, a sum of money for his own private benefit. Such an agreement is valid, and if the premium is not duly paid, it may be recovered by an action, provided the plaintiff has been ready and willing to take the defendant into partnership as agreed. (*d*)

The consideration for the premium is not only the creation of a partnership between the person who takes and him who parts with the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium and then the partnership is determined sooner than was expected, the question arises whether any, and if any, what part, of the premium ought to be returned.

In order to determine this point, it is necessary, in the first place, to ascertain whether the agreement for the premium was or was not tainted with fraud.

Premiums returnable in cases of fraud.—If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses, viz., either abide by the contract and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts; or he may disaffirm the contract, and thereby entitle himself to a return

thirty per cent. should be left undivided, but to be divided *pro rata* if not otherwise disposed of. B wrote to C a letter, which was signed by A in his own name, offering him of the contract between them "thirty per cent. of the profits, of which I represent seventy-five per cent., you to answer for any loss," &c., which proposal C accepted. *Held*, that C became a partner in the firm, and not merely a sharer in the profits of A. Arquimbo *v.* Hillier, 49 N. Y. Super. Ct. 253.

E. entered into a written agreement with the other defendants by which she agreed to put a stock of goods worth a specified amount of money in a certain store, and, to induce her husband to manage the same, the other defendants agreeing to endorse her paper to the same amount, which sum was to go into the business, and they were to have an interest at all times in the goods in the store to the amount of their endorsement, subject, however, to no liability except such endorsement. *Held*, that the agreement did not make the parties partners as to creditors. Magovern *v.* Robertson, 40 Hun (N. Y.) 166.

(*d*) Walker *v.* Harris, 1 Anstr. 245, where it was held that no partnership deed need be tendered.

of the whole of the money he has paid.(*e*) And *in a case of this sort, in the event of the bankruptcy of the defrauding partner, the amount of the premium paid to him is a debt provable against his estate in competition with his separate creditors.(*f*) [*65

Return of premium where the consideration for it has failed.—But, if the agreement by virtue of which the partnership was entered into, and the premium became payable, is not tainted by fraud, then the proper mode of dealing with the premium is not so easy to determine. In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium, and, consequently, it cannot be recovered as money paid for a consideration which has failed.(*g*) In the next place, persons who enter into partnership know that it may be determined at any time by death and other events, and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle.(*h*)

Apportionment of premium when partnership ceases sooner than was expected.—On the other hand, if a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium. Moreover, where there has been no misconduct, a premium paid for a partnership for a term of years has been held apportionable in the event of a premature determination of the partnership by an unforeseen occurrence. The fact that the consideration for the premium has partially failed has been considered sufficient to render it inequitable to retain or obtain payment of the whole premium.(*i*)

(*e*) See *infra*, pp. *65, *et seq.*; and as to rescinding for fraud, *infra*, book III., c. 10.

(*f*) Ex parte Turquand, 2 M., D. & D. 339; and see Bury *v.* Allen, 1 Coll. 589. The case of Ex parte Broome, as reported in 1 Rose 69, is opposed to this, but see, on that case, the note in 1 Coll. 598, and the observations at the end of the judgment, Id., p. 607.

(*g*) See Taylor *v.* Hare, 1 Bos. & P. N. R. 260.

(*h*) Whincup *v.* Hughes, L. R., 6 C. P. 78; Ferns *v.* Carr, 28 Ch. D. 409. See, also, Akhurst *v.* Jackson, 1 Swanst. 85; Bond *v.* Milburn, 20 W. R. 197.

(*i*) Similar views have been taken with respect to what is right in cases of a similar kind, arising on the death of a solicitor who has been paid a premium by an articled clerk. See Hirst *v.* Tolson, 2 Macn. & G. 134; Ex parte Bayley, 9 B. & C. 691. But these cases have been since disapproved. See Whincup *v.*

*66] *The principles applicable to cases of this description are not even yet well settled, nor are the decisions upon them easy to reconcile.

The following rules are, however, submitted to the reader as guides on this subject:

1. *Partnerships at will.*—Where a partnership is entered into for no specified time, and there is no agreement for a return or an apportionment of the premium in the event of an unexpected determination of the partnership, no part of the premium is returnable on the happening of such event. A case of fraud must be dealt with on its own demerits, and a person taking another into partnership for no definite time cannot, as soon as he has received the premium, dissolve the partnership and retain what has been paid as the consideration for it. (*k*) But laying aside fraud, and supposing there to be nothing except a partnership created for no specified time and determined soon after its creation, it is difficult to hold that it was in fact entered into for a longer time, and that the person who came in, paying a premium, has not got all for which he stipulated. (*l*)

2. *Partnerships for a time. Agreements to dissolve.*—Where a partnership is entered into for a specified time and is determined prematurely, the first matter for consideration is whether the parties have come to any agreement on the dissolution. If they have, and if they have also provided for the premium, it must be dealt with according to the agreement; but if the agreement on dissolution is silent with respect to the premium, the inference is that the parties did not intend to deal with it, nor to vary their rights to it under the original agreement for its payment. (*m*)

*Where, however, no agreement is come to on the dissolution, then the cause of dissolution must be considered. [*67

Premature termination. a. *By death.*—Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it. If, therefore, they do not expressly guard against this risk, they may reasonably be treated as content to incur it; and if death

Hughes, L. R., 6 C. P. 78, and Ferns *v.* Carr, 28 Ch. D. 409.

(*k*) Featherstonhaugh *v.* Turner, 25 Beav. 382. See, also, Hamil *v.* Stokes, Dan. 20, and Burdon *v.* Barkus, 4 De G., F. & J. 42, per Turner, L. J.

(*l*) See per Lord Eldon, in Tattersall *v.* Groote, 2 Bos. & P. 134.

(*m*) See Lee *v.* Page, 30 L. J. Ch. 357, and 7 Jur. (N. S.) 768. A mere consent to dissolve may leave all questions of this sort open, as in Astle *v.* Wright, 23 Beav. 77; Wilson *v.* Johnstone, 16 Eq. 606; Bury *v.* Allen, 1 Coll. 589.

should unexpectedly happen, no return of premium not expressly provided for can, it is apprehended, be demanded. (*n*) But even in this case, if a person knows himself to be in a dangerous state of health and conceals that fact, and induces another to enter into partnership with him, and to pay him a premium, and shortly afterwards dies, the fraud so practiced will entitle the partner paying the premium to a return of part of it, and he can obtain such return in an action for a partnership account; he need not rescind the contract *in toto*. (*o*)

b. *By bankruptcy.*—Bankruptcy of the partnership, as distinguished from the bankruptcy of one of the partners, cannot, it is apprehended, be a ground for apportioning a premium, for it is a contingency which every one may fairly be taken as contemplating. (*p*) But the bankruptcy of a partner receiving a premium is a ground for its apportionment if he was embarrassed when the partnership commenced, and this fact was not known to his copartner; (*q*) but not if it was. (*r*) What the effect would be if he became embarrassed after the commencement of the partnership, has not been decided. The bankruptcy of the partner paying the premium cannot entitle him or his trustee to a return of any part of it, unless he has been made bankrupt by his copartner who has received the premium. (*s*)

c. *Lunacy.*—The lunacy of a partner causing a dissolution would perhaps be considered as a ground for apportioning the premium.

*68] *d. *Disagreements.*—Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The tendency of modern decisions is to apportion the premium in these cases, not only where neither partner is to blame, (*t*) but *a fortiori* where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved, (*u*) and it matters not that the latter may himself not be altogether free from blame; (*x*) nor is the rule altered by the fact that

(*n*) See Whincup *v.* Hughes, L. R., 6 C. P. 78; Ferns *v.* Carr, 28 Ch. D. 409.

(*o*) Mackenna *v.* Parkes, 36 L. J. Ch. 366, and 15 W. R. 217.

(*p*) See Akhurst *v.* Jackson, 1 Swanst. 85.

(*q*) Freeland *v.* Stansfeld, 2 Sm. & G. 479.

(*r*) Akhurst *v.* Jackson, 1 Swanst. 85.

(*s*) As in Hamil *v.* Stokes, Dan. 20, and 4 Price 161. In this case it is to be observed that the contract of partnership was not rescinded on the ground of fraud.

(*t*) Atwood *v.* Maude, 3 Ch. 369.

(*u*) Bullock *v.* Crockett, 3 Giff. 507. See, also, Rooke *v.* Nisbet, 50 L. J. Ch. 588, where the partner dissolving was in fault, and was the party to receive the premium.

(*x*) Atwood *v.* Maude, 3 Ch. 369 (where

the partners have consented to dissolve since the institution of legal proceedings. (*y*)

Misconduct.—But where a partner has paid or agreed to pay a premium, and has so misconducted himself as to induce the court to dissolve the partnership on that ground, he cannot recover any part of the premium if he has paid it, nor avoid paying it if it is due and it is still unpaid. (*z*) In Wilson *v.* Johnstone, (*a*) Wickens, V. C., held that the misconduct must be such as to amount to a complete repudiation of the contract of partnership, but he did not lay down any rule for determining what misconduct amounts to such a repudiation, and the statement in the text is in accordance with the latest decision on the subject. (*b*)

3. *Amount to be returned.*—There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered, but other circumstances must often be taken into *account in order to decide what is fair between the parties. (*c*) At the same time, the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership. (*d*) [*69

The proper time for obtaining the decision of the court upon the question whether any part of a premium is returnable or not, is the hearing of the action. An inquiry on this point will not be added afterwards except under special circumstances. (*e*)

the partner paying the premium was plaintiff); Astle *v.* Wright, 23 Beav. 77; Pease *v.* Hewitt, 31 Beav. 22. Compare Airey *v.* Borham, 29 Beav. 620, where nothing was returned.

(*y*) Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Wilson *v.* Johnstone, 16 Eq. 606. Compare Lee *v.* Page, 7 Jur. (N. S.) 768, and 30 L. J. Ch. 857.

(*z*) See Bluck *v.* Capstick, 12 Ch. D. 863; Wilson *v.* Johnstone, 16 Eq. 606; Airey *v.* Borham, 20 Beav. 620; Atwood *v.* Maude, 3 Ch. 369.

(*a*) 16 Eq. 606.

(*b*) Bluck *v.* Capstick, 12 Ch. D. 863.

(*c*) Lyon *v.* Tweddell, 17 Ch. D. 529, which shows that the court has a wide discretion in this matter.

(*d*) See Wilson *v.* Johnstone, 16 Eq. 606; Atwood *v.* Maude, 3 Ch. 369; Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Pease *v.* Hewitt, 31 Beav. 22. Compare Bullock *v.* Crockett, 3 Giff. 507; Freeland *v.* Stansfeld, 1 Sm. & G. 479; Hamil *v.* Stokes, Dan. 20, where this rule was not adhered to.

(*e*) Edmunds *v.* Robinson, 29 Ch. D. 170.

*70] # *CHAPTER III.

OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP.

SECTION I.—OF THE NUMBER OF PARTNERS, *70.
SECTION II.—OF THE CAPACITY OF PARTNERS, *71.
1. *Aliens*, *72.
2. *Felons and Outlaws*, *73.
3. *Infants*, *74.
4. *Lunatics*, *76.
5. *Married Women*, *77.
6. *Corporations and Companies*, *78.

The parties to a contract of partnership may be considered with reference to

1. Their number.
2. Their capacity.

SECTION I.—OF THE NUMBER OF PARTNERS.

Statutes regulating the number of persons who may be partners.—By the common law of this country there is no limit to the number of persons who may be associated together in partnership. (*a*)

But from time to time various statutes have been passed declaring that certain partnerships shall be either altogether illegal, or, at all events, deprived of some important rights, or exposed to serious penalties, if their members exceed a prescribed number. Of these statutes the Companies act, 1862, is the only one of present practical importance. This act, by section 4, limits the greatest number of persons who can carry on business as partners, otherwise than under its provisions, to ten, if the business is that of bankers, and to twenty in other cases. (*b*) But this enactment does not apply to partnerships formed before the 2d of November, 1862 (see section 2), nor to those

(*a*) As to the supposed illegality of partnerships so large as to be incapable of practically suing and being sued, see the volume on Companies.

(*b*) See, on this subject, the volume on Companies.

formed in pursuance of some other act of parliament, or of letters patent, nor to companies engaged in working mines within and subject to the jurisdiction of the stannaries.

All the other statutes relating to this subject, except the Banking act of 7 Geo. IV., c. 46, have been repealed; (*c*) and *although that act is still in force, no partnership or company can now be formed under it. That act limited the number of persons who could lawfully carry on business as bankers in partnership and issue notes (except under certain restrictions), to six. (*d*) [*71

SECTION II.—OF THE CAPACITY OF PARTNERS.

Persons who cannot be partners.—By the law of this country, a valid contract of partnership can be entered into between any persons who are not under the disabilities of minority or unsoundness of mind, and are not convicts within the meaning of 33 and 34 Vict., c. 23. As will be seen hereafter, when treating of illegal partnerships, there are certain trades, businesses and professions which cannot be lawfully carried on, either solely or in partnership, unless some statutory requisite has been complied with. But now that the disabilities under which spiritual persons formerly lay have been removed, (*e*) the writer is not aware that there is any class of persons (except convicts) who, being of sound mind and over twenty-one, are rendered incapable of becoming members of a partnership. Married women may be partners, as will appear later on.

Agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only, in some respects, less effective than if all the parties to them were competent. Hence, there is nothing to prevent a person who is not *sui juris* from being a partner. But if any such person is a partner,

(*c*) A list of them will be found in the second edition of this treatise, vol. I., p. 82.

(*d*) See, on this subject, *infra*, book I., c. 5, § 1.

(*e*) The law relating to the clergy is now 1 and 2 Vict., c. 106, §§ 29–31, and 4 Vict., c. 14. Although a violation of those laws is attended with the risk of suspension and deprivation, it is expressly enacted that contracts entered into contrary to them shall not be void (see Lewis *v.* Bright, 4 E. & B. 917). Consequently the disability under which the clergy formerly lay, and which rendered all partnerships and companies of which they were *de facto* members illegal (Hall *v.* Franklin, 3 M. & W. 259), exists no longer.

his or her want of capacity to contract will necessarily give rise to consequences deserving special notice. These may be considered as they affect, first, aliens; second, felons and outlaws; third, infants; fourth, lunatics; fifth, married women; and sixth, corporations and companies.

*1. *Aliens.*

*72]

Alien friends.—There is nothing to prevent an alien, not an enemy, from being a partner. (*f*) But a public minister of a foreign state, accredited to and received by the queen, cannot be sued here even in respect of commercial transactions in which he may have engaged. (*g*)

Alien enemies stand in a very different position from alien friends.

Effects of war on the rights of partners.—When two supreme powers are at war, all persons who, for the time being, are the subjects of either, become, in contemplation of the civil tribunals of both, hostile to the subjects of the other, and so long as the war lasts, the subjects, for the time being, of the one country are incapable of entering into any valid contract with the subjects of the other, and all remedies available for the one against the other, in respect of transactions before the war, are suspended. (*h*) Consequently no partnership can subsist between the subjects of hostile powers; (*i*) and if two partners are resident in two different countries, their partnership is determined by a war between those countries. (*k*)

These doctrines, however, are only recognized and enforced by the belligerent powers. Neutrals do not apply them to the determination of commercial questions arising between the subjects of belligerent states.

It is to be remembered that whether a person is or is not to be considered as an enemy depends, not on whether there is war between this country and his native land, but upon whether *there is war between this country and the country in which he is volun- [*73

(*f*) Co. Lit. 129 *b*; Bac. Ab., "Alien," D. See, generally, as to aliens, 33 Vict., c. 14.

(*g*) Taylor *v.* Best, 14 C. B. 487; Magdalena Steam Nav. Co. *v.* Martin, 2 El. & E. 94.

(*h*) Albretcht *v.* Sussmann, 2 Ves. & B. 323; Willison *v.* Patteson, 7 Taunt. 440; Ex parte Boussmaker, 13 Ves. 71; Potts *v.* Bell, 8 T. R. 548. See the note to Clemonston *v.* Blessig, 11 Ex. 141.

(*i*) See Evans *v.* Richardson, 3 Mer. 469; and *infra*, the chapter on Dissolution.

(*k*) See Griswold *v.* Waddington, 15 Johns. (N. Y.) 57, and 16 Id. 438. Whether peace operates retrospectively, see New York Life Ins. Co. *v.* Statham,

tarily resident. It is the place of his residence or trading, and not the place of his birth, which is of importance in these matters; (*l*) and therefore, if a foreigner comes over here, enters into partnership here, and dwells here, and then war breaks out between this country and that of which he is a native, the partnership will not, nor will his rights as a partner, be affected by the war, any more than if he were an Englishman. (*m*) On the other hand, if a partnership consists wholly of Englishmen, some of whom reside here and some in another country, and war breaks out between that country and this, the partners become enemies for all purposes of trade and commerce, just as much as if those abroad were natives of the country in which they reside. (*n*) The same is true, even in the absence of any fixed residence in the belligerent country, if some of the partners go over there and trade there during the war. (*o*)

2. *Felons and outlaws.*

Felons and outlaws.—Formerly a felon's or outlaw's share in a partnership vested in the crown; (*p*) and although a felon or outlaw could contract, he could not sue in his own right until his disability had been removed; *i. e.*, in the case of felony until pardon or expiration of the term of punishment, and in case of outlawry, until its reversal. (*q*) But no person could plead his own attainder or outlawry as a defence to an action against him. (*r*) As regards outlaws, the law in these respects *remains unchanged; the law, however, respecting felons was materially altered by 33 and 34 Vict., c. 23. This act abolished forfeiture for felony, (*s*) and empowers the crown to commit the custody and management of the property of any convict (*i. e.*,

*74]

3 Otto (U. S.) 24; and Parsons on Part., c. 3, §§ 1, 3.

(*l*) See Albretcht *v.* Sussmann, 2 Ves. & B. 323; Willison *v.* Patteson, 7 Taunt. 440; Houriet *v.* Morris, 3 Camp. 303; Bell *v.* Reid, 1 Man. & S. 726.

(*m*) See Wells *v.* Williams, 1 Ld. Raym. 282, and 1 Salk. 46, in which it was held that a plea of alien enemy was no defence to an action brought by a foreigner domiciled here, though there was war between his country and this.

(*n*) See McConnell *v.* Hector, 3 Bos. & P. 113; O'Mealey *v.* Wilson, 1 Camp. 482, and compare Roberts *v.* Hardy, 3 Man. & S. 533, and Ex parte Baglehole, 18 Ves. 525, and 1 Rose 271.

(*o*) See The Yonge Klassina, 5 Ch. Rob. 303; The Indian Chief, 3 Id. 12; The Portland, Id. 41.

(*p*) Bac. Ab., "Felony and Outlawry;" Co. Lit. 128.

(*q*) Ib., and see Bullock *v.* Dodds, 2 B. & A. 258.

(*r*) Foster's Cr. L. 61.

(*s*) Section 1.

a person sentenced to death or penal servitude (*t*)) to an administrator, (*u*) in whom all the convict's property, both real and personal, then becomes vested. (*x*) Moreover, a convict is absolutely disabled from alienating any property or making any contracts, and from suing, (*y*) except when lawfully at large under a proper license. (*z*) Provision is also made for the appointment of an *interim* curator of a convict's property. (*a*) Practically, this act facilitates the dissolution and winding up of a partnership in the event of a member being convicted of felony. But it is unnecessary to allude further to this statute in the present place.

3. *Infants.*

Infant partners.—An infant may be a partner. But, speaking generally, whilst he is an infant he incurs no liability and is not responsible for the debts of the firm; and when he comes of age, or even before, he may, if he chooses, disaffirm past transactions. (*b*)

The irresponsibility of an infant for the debts of a partnership of which he is a member is an obvious consequence of his general incapacity to bind himself by contract, and does not require to be supported by any special authority. (*c*) It might, perhaps, be thought that an infant who held himself out as a partner would be liable to persons trusting to his representations if they did not know him to be under age; but this is not so; (*d*) and as an infant is not responsible for the torts of *his agent, an infant partner cannot be held liable for the misconduct of his copartners. The irresponsibility of an infant as a partner seems, therefore, to be complete, except in cases of fraud. [*75

But an infant who was guilty of fraud was not so free from liability in equity as he was at law, (*e*) and equitable as distinguished from legal

(*t*) Section 6.
(*u*) Section 9.
(*x*) Section 10.
(*y*) Section 8.
(*z*) Section 30.
(*a*) Section 21, *et seq.*
(*b*) See Goode *v.* Harrison, 5 B. & A. 157–159; Ex parte Taylor, 8 De G., M. & G. 254.
(*c*) Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Frebain, 5 Id. 47; Gibbs *v.* Merrill, 3 Taunt. 307; and Burgess *v.* Merrill, 4 Id. 468, show that an infant partner ought not to be joined as a defendant in an action against the firm.
(*d*) See Price *v.* Hewitt, 8 Ex. 146; Johnson *v.* Pye, Vin. Ab., "*Enfant*," H, 2, pl. 16; Glossop *v.* Colman, 1 Stark. 25; Green *v.* Greenbank, 2 Marsh. 485.
(*e*) See Wright *v.* Snowe, 2 De G. & S. 321.

relief, *e. g.*, rescission of contract, may be obtained against him. (*f*) In accordance with these principles, although, as a rule, an infant cannot be made bankrupt, (*g*) yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate. (*h*)

Repudiation by infant.—Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his copartners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits. (*i*)

Time for avoidance of infant's contract.—An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age. (*k*) If he avoids the contract and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it, (*l*) but he cannot do this if he has already obtained advantages under the contract, and cannot restore the party contracting with him to the same position as if no contract had been entered into. (*m*)

*76] *Ratification by infant of his contract.*—If, when an infant partner comes of age he is desirous of retiring from the firm, he should express his determination speedily and unequivocally. It is true that by the Infants' Relief act, 1874, (*n*) promises made by a person who has attained twenty-one to pay debts contracted before that age cannot be enforced; but a person who retains a share in a partnership cannot retain it without its incidental obligations, (*o*) and

(*f*) Lempriere *v.* Lange, 12 Ch. D. 675.

(*g*) Ex parte Jones, 18 Ch. D. 109; Ex parte Henderson, 4 Ves. 163; Ex parte Lees, 1 Deac. 705; Belton *v.* Hodges, 9 Bing. 365.

(*h*) See Ex parte Watson, 16 Ves. 265; Ex parte Bates, 2 Mont., D. & D. 337; Ex parte Unity Banking Assoc., 3 De G. & J. 63.

(*i*) See Lon. & N. W. Rail. Co. *v.* McMichael, 5 Ex. 114, and other cases of that class, in the volume on Companies.

(*k*) Co. Lit. 380 *b*. Newry and Enniskillen Rail. Co. *v.* Coombe, 3 Ex. 565; Dublin and Wicklow Rail. Co. *v.* Black, 8 Ex. 181.

(*l*) Corpe *v.* Overton, 10 Bing. 253.

(*m*) Holmes *v.* Blogg, 8 Taunt. 508; Ex parte Taylor, 8 De G., M. & G. 254. Compare Mann's Case, 3 Ch. 459, and Curtis' Case, 6 Eq. 455, where the infant had sold some shares, but not the rest.

(*n*) 37 and 38 Vict., c. 62, § 2.

(*o*) See Lon. & N. W. Rail. Co. *v.* McMichael, 5 Ex. 114; Cork and Bandon Rail. Co. *v.* Cazenove, 10 Q. B. 935, per Coleridge and Erle, JJ.; Ebbett's Case, 5 Ch. 302. Compare Baker's Case, 7 Ch. 115.

the doctrine of holding out is itself sufficient to impose liability upon an adult, although he may not long have attained his majority. This is well exemplified in Goode *v.* Harrison. (*p*) There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his copartners subsequently to that time. A person who, before he comes of age, represents himself as a partner, must, when he comes of age, take care to notify that he has ceased to be a partner if he desires to avoid liability. [1]

(*p*) 5 B. & A. 147.

1. Infant partners.—An infant's partnership agreement is not void, but voidable only. Denton *v.* Brown, 31 Mich. 182.

An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services. Penn *v.* Whitehead, 17 Gratt. (Va.) 503.

In Massachusetts it is held that an infant who enters into a partnership, contributes capital and does work for the firm, cannot, afterwards, by rescinding the contract, recover the money so contributed, or recover for the work so done, in the absence of an express promise. Page *v.* Morse, 128 Mass. 99.

The New York courts, however, hold that an infant partner, on rescinding his partnership contract, may recover from the adult partner, individually, the capital paid to him. Sparman *v.* Keim, 83 N. Y. 245; reversing 44 Super. Ct. 163.

A bill for the dissolution of a partnership will not abate on the filing by the defendant of a plea of infancy, where, on complainant's motion to reject the plea, it appears that defendant deceived him in respect to his age. Bush *v.* Linthicum, 59 Md. 344. But such infant partner is not individually liable for firm debts, aside from the amount contributed by him, in the absence of ratification after majority, nor is he amenable to the costs of the bill to dissolve. Ib.

A father invested his own funds and personal services, and the funds of his children in his hands as guardian, arising from an unauthorized sale of their property, in a partnership for their benefit. The children afterwards sought to enforce the partnership in equity. *Held*, that the other partner could not avail himself of these facts to avoid the contract. Stein *v.* Robertson, 30 Ala. 286.

That the entering into a commercial business by an infant is, in effect, a declaration to all who deal with him that he is of full age, see Studwell *v.* Shapter, 54 N. Y. 249.

A widow and natural tutrix of her minor children, having the possession and administration of the property of her husband's succession during her life, entered into a partnership with the heirs, who were of full age, and slaves and other property of the succession were employed and used by the partnership. *Held*, that the infant heirs were not, and could not be made, by her act, members of the partnership; and that they, consequently, after her death, had the right to sue for and recover from the surviving partners a debt due them by the partnership, before a settlement and liquidation of partnership affairs. Cuillé *v.* Gassen, 14 La. Ann. 5.

An infant entered into partnership in S. county, with two others, and put in $1000. Before his majority the partnership was dissolved, he receiving his $1000 back again. After this he removed to H. county, and one A recovered a judgment

4. *Lunatics.*

Lunatic partners.—If a lunatic enters into a contract with a person who acts *bona fide*, and who does not know of the incapacity under which the lunatic labors, the lunatic is so far bound by the contract, that if it has been executed he cannot avoid it. (*q*) So, if a person *bona fide* contracts with a lunatic, without knowing him to be so, and performs the contract, lunacy affords no defence to an action for remuneration for what has been done. (*r*) It is not, therefore, possible to lay down as a universal proposition that contracts entered into by persons who are lunatics are void, nor consequently that such persons are incapable of being partners.

*Any doubt, however, which might exist upon this subject in point of principle is removed by those decisions which have [*77 settled that an existing partnership is not dissolved by the mere fact that one of its members has become lunatic, and that, notwithstanding his lunacy, he is entitled to share the profits made subsequently by his copartners. (*s*) To these authorities, which will be examined hereafter, may be added the case of Sadler *v.* Lee, (*t*) in which it was held that if a member of a going partnership becomes imbecile, he is nevertheless responsible for the subsequent misconduct of the other members. It seems, therefore, that by the law of this country a lunatic is capable of being a partner, but all dealings and transactions with him when his lunacy is known are liable to be impeached.

5. *Married women.*

Married women partners.—A married woman who has no separate estate is incapacitated from entering into any contract binding on her-

against the firm, including the infant, without his knowledge. A transferred the judgment to B. Three years afterwards, B sued on the judgment, and recovered a second judgment, no process being served on the infant. B issued an execution to the sheriff of H. county, which was levied on the property of the infant there. He filed a bill, stating the foregoing facts, charging fraud, &c., and an injunction staying proceedings on the execution was issued. Vansyckle *v.* Rorback, 2 Halst. (N. J.) Eq. 234.

(*q*) See Molton *v.* Camroux, 2 Ex. 487, and 4 Id. 17; Beavan *v.* M'Donnell, 9 Id. 309, and 10 Id. 184.

(*r*) See Drew *v.* Nunn, 4 Q. B. D. 661; Baxter *v.* The Earl of Portsmouth, 5 Barn. & C. 170; Brown *v.* Jodrell, 3 Car. & P. 30. See, as to the *onus* of proof where the lunatic has been so found by inquisition, Snook *v.* Watts, 11 Beav. 107.

(*s*) Jones *v.* Noy, 2 Myl. & K. 125.

(*t*) 6 Beav. 324.

self (*u*) except, first, when the husband is a convicted felon; (*x*) second, when the husband and wife are judicially separated; (*y*) third, where the wife is protected from her husband by an order obtained under the divorce acts; (*z*) fourth, when the husband is an alien enemy and abroad. (*a*) In these cases the wife is as capable of contracting as if she were unmarried. By the custom of London, moreover, a married woman may be a trader, and contract as if she were not married. (*b*) Neglecting these exceptions, it seems clear that a married woman without separate estate, having no capacity to contract, cannot be a partner. She may, however, be the agent of other people and bind them, although not herself. Moreover, as in the case of infants, so in the case of married women having no separate estate, holding themselves out as partners does not subject them to the responsibilities which are incurred by other persons who act in a similar way. (*c*)

*78] **Position of married women with separate estate.*—But a married woman who has separate estate, which she is not restrained from anticipating, is as to such estate regarded as a *feme sole*, and debts and obligations incurred by her, either expressly or impliedly, on the credit of that estate, can be enforced against it, although not against her personally. (*d*) Supposing, therefore, that a married woman partner has such separate estate, it will be liable for the debts of the partnership, and to that extent she will be a partner. (*e*) But her husband will not. A married woman having separate estate may lend money to her husband, but if lent to him for purposes of trade and he becomes bankrupt, she is postponed to his other creditors; (*f*) but a loan by her to a partnership of which her husband is a member, is payable out of its assets like any other joint debt. (*g*)

A married woman having separate property and carrying on business separately from her husband, is liable to the bankruptcy laws. (*h*)

(*u*) Marshall *v.* Rutton, 8 T. R. 545.

(*x*) See Ex parte Franks, 7 Bing. 762.

(*y*) 20 and 21 Vict., c. 85, §§ 25, 26.

(*z*) 20 and 21 Vict., c. 85, § 21, and 21 and 22 Vict., c. 108, §§ 6–10.

(*a*) Derry *v.* Mazarine, 1 Ld. Raym. 147; Barden *v.* Keverberg, 2 Mees. & W. 61.

(*b*) See, as to this, Beard *v.* Webb, 2 Bos. & P. 93.

(*c*) See The Liverpool Adelphi Loan Assoc. *v.* Fairhurst, 9 Ex. 422.

(*d*) See 45 and 46 Vict., c. 75, §§ 1, 12, 19; Re Shakespear, 30 Ch. D. 169; Palliser *v.* Gurney, 19 Q. B. D. 519.

(*e*) See Matthewman's Case, 3 Eq. 781, where she was held a contributory. See, as to a married woman's separate trade, Ashworth *v.* Outram, 5 Ch. D. 923.

(*f*) 45 and 46 Vict., c. 75, § 3.

(*g*) Ex parte Nottingham, 19 Q. B. D. 88.

(*h*) 45 and 46 Vict., c. 75, § 1 (5); Ex parte Gilchrist, 17 Q. B. D. 521.

But her position, if she carries on business in partnership with him, is not defined. There is, however, no reason why she should not do so; (*i*) her liability to the extent of her separate estate for his contracts and his liability for hers would, in such a case, be governed by the principles of agency. (*k*) [2]

6. *Corporations and companies.*

Corporations, &c., may be partners.—There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution. (*l*) Having regard, however, to this *principle, it may be considered as *prima facie ultra vires* for an incorporated company to enter into partnership with other persons. (*m*) [3] [*79

(*i*) See Butler *v.* Butler, 16 Q. B. D. 374.

(*k*) A husband is liable for his wife's torts. Seroka *v.* Kattenburg, 17 Q. B. D. 177.

2. Married women as partners.—In Massachusetts, a husband and wife cannot enter into a partnership contract (Pub. Stat., c. 147, § 2); and she is not liable for the rent of a store hired by him in their joint names as partners. Bowker *v.* Bradford, 140 Mass. 521. But a *feme covert* may be bound by a note given in the name of a trading partnership of which she is a member, if her husband is not a member of the firm. Plumer *v.* Lord, 5 Allen (Mass.) 460. Otherwise if her husband is also one of the firm. Lord *v.* Parker, 3 Id. 127.

In New Hampshire, the coverture of a female member of the defendant firm at the time of contract may be given in evidence to defeat the action. Brown *v.* Jewett, 18 N. H. 230.

In New York, a husband and his wife may be partners, under the firm name of the husband "& Co." Zimmerman *v.* Erhard, 8 Daly (N. Y.) 311; affirmed, 83 N. Y. 74; S. C., 38 Am. Rep. 396.

In South Carolina, married women are allowed to become *feme sole* traders after the manner of the custom of London. Newbiggin *v.* Pillans, 2 Bay (S. C.) 162; Surtell *v.* Brailsford, Id. 333; Dial *v.* Neuffer, 3 Rich. (S. C.) 78; Hobart *v.* Lemon, Id. 131. See, also, Wallace *v.* Rippon, 2 Bay (S. C.) 112; Louillier *v.* Wernicki, 3 E. D. Smith (N. Y.) 310; Wieman *v.* Anderson, 42 Pa. St. 311.

(*l*) See Gill *v.* Manchester, Sheffield, &c., Rail. Co., L. R., 8 Q. B. 186, as to one company being the agent of another, if not its partner.

(*m*) See the American cases, Sharon Coal Corp. *v.* Fulton Bank, 7 Wend. (N. Y.) 412; Catskill Bank *v.* Gray, 14 Barb. (N. Y.) 479. As to holding out, see Holmes *v.* Old Colony R. R. Co., 3 Gray (Mass.) 58.

3. Corporations as partners.—At common law, one corporation was held competent to become a member with another (Grant on Corporations 5), and upon principle there would seem to be no question but that it may be a partner

with another corporation (Dalton City Co. *v.* Dalton Manuf. Co., 33 Ga. 243), or with an individual (Holmes *v.* Old Colony R. R. Co., 5 Gray (Mass.) 58; Allen *v.* Woonsocket Co., 11 R. I. 288), in any purpose connected with or incident to its business. Whether it can become a partner, and assume all the rights and liabilities as such in a matter foreign to the business and purposes for which it was established, is perhaps questionable, but it is believed that whatever might be the rule as to the rights of the corporation in such a firm, it might render itself liable as a partner to those who dealt with the firm in ignorance of the scope and extent of its corporate rights and powers. Collyer on Part., p. 25.

*80] # *CHAPTER IV.

OF THE EVIDENCE BY WHICH A PARTNERSHIP OR QUASI PARTNERSHIP MAY BE PROVED.

Evidence by which a partnership or quasi partnership may be proved.—The contract of partnership is one of those which does not require to be entered into with any particular formalities. By the common law of this country, a partnership may be constituted without any official act, such as registry, without any instrument under seal, and even without any writing whatever; and this is the law at the present time, except so far as it has been altered by the statute of frauds, by the acts relating to marine insurance, (*a*) and by the various statutes relating to companies. But although a partnership may be constituted without any deed or writing, still, a person who has entered into a mere verbal agreement for a partnership with another, will not be able to sustain an action for its breach, unless he can prove the terms upon which the partnership was to be entered into. (*b*)

Statute of frauds.—The only statutory enactment applicable to ordinary partnerships is the statute of frauds, the fourth section of which enacts, amongst other things:

"That no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Future partnerships, &c.—This enactment applies as well to an agreement for a partnership to commence more than a year from the date of the agree*ment (*c*) as to an agreement for a present partnership to last more than a year from its commencement. (*d*) [*81

(*a*) By 30 Vict., c. 23, § 7, agreements for marine insurance must be in writing and stamped; and a mutual marine insurance society which infringes these enactments is an illegal society. See *infra*, book I., c. 5, § 1.

(*b*) Figes *v.* Cutler, 3 Stark. 139.

(*c*) See per Holroyd, J., in Williams *v.* Jones, 5 Barn. & C. 108.

(*d*) Ib.; and see Britain *v.* Rossiter, 11 Q. B. D. 123. But see, as to this, McKay *v.* Rutherford, 6 Moore P. C. 414, and 13 Jur. 21.

But if in either case the parties have acted on the agreement and become partners, they must be treated as such, and the statute will not be applicable. (*e*) [1]

Partnerships in land.—With respect to that part of the fourth section of the statute of frauds which relates to lands, it is held, first, that a partnership constituted without writing is as valid as one constituted by writing; (*f*) and second, that if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land. This was first clearly laid down in Forster *v.* Hale, (*g*) where a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property, and it was objected that there was no signed writing such as the statute required. But to this the Lord Chancellor observed:

"That was not the question; it was whether there was a partnership. The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purpose of that partnership are *by operation of law* held for the purposes of that partnership."

The principle here stated was carried to its extreme limit by Vice Chancellor Wigram in Dale *v.* Hamilton. (*h*) He held that an

(*e*) See Baxter *v.* West, 1 Dr. & Sm. 173, where the partners had acted on, and were held bound by, an unsigned memorandum, continuing a partnership for seven years. See, also, Williams *v.* Williams, 2 Ch. 294, and per Turner, L. J., in Burdon *v.* Barkus, 4 De G., F. & J. 47.

1. Future partnerships.—Where two persons, as intended partners, purchase a stock of goods and agree to give their notes therefor, and on receiving the goods at the time fixed, one of them, the other being absent, signs and delivers the notes in their joint names, the notes thus given are firm notes, and the agreement and its consummation present a strong *prima facie* case of partnership in an action against them, on a contract made by one of them with another party in the name of the firm. Drennen *v* House, 41 Pa. St. 30.

Evidence of an agreement between a surviving partner and the brother of a deceased partner that upon the death of the deceased partner the brother should become a partner in the concern, and be entitled to a share of the profits, is not sufficient to establish a partnership. Brink *v.* New Amsterdam Fire Ins. Co., 5 Robt. (N. Y.) 104.

(*f*) Essex *v.* Essex, 20 Beav. 449.

(*g*) 5 Ves. 309.

(*h*) 5 Hare 369; S. C., on appeal, 2 Ph. 266.

agreement to form a partnership for the purpose of buying and selling land might be proved by parol; that it might then be shown by parol
*82] that certain land had been *bought for the purposes of the partnership, and consequently, that the plaintiff was entitled to a share of the profits obtained by its resale. The Vice Chancellor directed an issue as to the fact of partnership, but his decision is an authority for the proposition that the statute of frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit.(*i*)

This is certainly going a long way towards repealing the statute of frauds. Dale *v.* Hamilton was appealed from, and the plaintiff obtained a decree without any issue as to the fact of partnership.

Both in Forster *v.* Hale and in Dale *v.* Hamilton there was a signed writing showing a trust in the plaintiff's favor; and this circumstance was relied on by Sir William Grant in the former case,(*j*) and by Lord Cottenham in the latter;(*k*) but, curiously enough, the signed writing was not made the foundation of the decision of Lord Rosslyn in Forster *v.* Hale, and was not considered sufficient by Vice Chancellor Wigram in Dale *v.* Hamilton.

His decision is difficult to reconcile with sound principle, or with the more recent decision of Caddick *v.* Skidmore.(*l*) There, the plaintiff alleged that it had been agreed between him and the defendant that they should become partners in a colliery and share the profits equally. The plaintiff sought to enforce that agreement. The defendant denied the alleged agreement, and asserted that the true agreement was that the plaintiff and the defendant should share the royalties obtained from the colliery. The defendant also set up the statute of frauds as an answer to the plaintiff's claim. In this case, no partnership in fact was proved, and there was no agreement for a partnership as distinguished from the agreement to share the profits of the colliery in question. The terms of that agreement were not in writing and were in dispute. Under these circumstances, the statute of frauds was properly held to be a defence to the action.

**Part performance.*—In considering cases of this description, the equitable doctrines of part performance must be [*83 borne in mind. They may enable a plaintiff to prove a parol agree-

(*i*) See, too, Cowell *v.* Watts, 2 Hall & T. 224.

(*j*) Forster *v.* Hale, 3 Ves. 696.

(*k*) Dale *v.* Hamilton, 2 Ph. 266.

(*l*) 2 De G. & J. 52.

ment for sharing the profits arising from land, notwithstanding the statute of frauds.(*m*)[2]

Question of partnership or no partnership, a mixed question of law and fact.—The question whether a partnership does or does not subsist between any particular persons is a mixed question of law and fact, and not a mere question of fact. If it comes before a jury, the

(*m*) See Cowell *v.* Watts, 2 Hall & T. 224, where the plaintiff succeeded on this point, although by reason of his laches he failed to obtain a decree.

2. Partnerships in land.—A partnership for the purchase and sale of land may be created and proved by parol. Chester *v.* Dickerson, 54 N. Y. 1; S. C., 13 Am. Rep. 550. S. P., Traphagen *v.* Burt, 67 N. Y. 30; Getty *v.* Devlin, 54 Id. 403; Tompkins *v.* Lee, 2 Thomp. & C. (N. Y.) 589; Bissell *v.* Harrington, 18 Hun (N. Y.) 81. *Contra* in California. Gray *v.* Palmer, 9 Cal. 616. But an oral contract for the joint purchase of land will not constitute a partnership. Levy *v.* Bush, 45 N. Y. 589; reversing 1 Sweeney 653.

While a partnership in growing crops may be formed and proved by parol, a partnership in the crops, arising out of an alleged particular partnership in lands and negroes, cannot be. The latter is not a partnership by contract, but by consequence of an alleged partnership in immovables. Gantt *v.* Gantt, 6 La. Ann. 677. See, also, Dunbar *v.* Bullard, 2 La. Ann. 810; Benton *v.* Roberts, 4 Id. 216.

A partnership entered into and commenced immediately, is not void, although one of the declared objects is the purchase of real estate for the purposes of the firm, and as a site for the transaction of its business. Smith *v.* Tarleton, 2 Barb. (N. Y.) Ch. 336.

Where a proposition to form a partnership for the buying and selling of lands is accepted and acted upon, and the contract is fully executed, it is too late to deny the existence of the contract, or complain of the manner in which it was entered into; and after having received the full benefit of the transaction, and availed himself of all the advantages arising from the services rendered by his copartner, the other partner cannot be heard to charge bad faith on the part of his copartner in making a purchase of land. Hunter *v.* Whitehead, 42 Mo 524.

The fact that real estate is treated in the firm books like other partnership property, is controlling as between the partners themselves, as respects intention, where the question is whether the real estate is partnership property. Fairchild *v.* Fairchild, 64 N. Y. 471; affirming 5 Hun 407.

If a partnership be proved to exist by any memorandum in writing, or by the books and other written transactions of the parties, that will suffice to establish a partnership trust in lands, intended and treated by them as partnership property, however the lands be held in law, and will not be incompatible with the conditions of the statute of frauds. Fall River Whaling Company *v.* Borden, 10 Cush. (Mass.) 458.

In Alabama it has been held that a parol agreement of copartnership, for the purchase of lands, is within the statute of frauds, and will not be enforced in equity. Larkins *v.* Rhodes, 5 Port. (Ala.) 195.

In North Carolina a parol contract for the formation of a partnership, by which one partner agrees to sell land to the firm, is void *in toto*, at the option of either party. Clancy *v.* Craine, 2 Dev. (N. C.) Eq. 363.

M. and S. being partners, the former purchased a tract of land of R. which was

question must be decided by them. They, taking their own view of the effect of the evidence before them, are bound to apply to the facts established to their satisfaction those legal principles which the court may lay down for their guidance.(*n*)[3]

occupied by both for the uses of the firm. In a suit against R., to compel him to convey the land to S., and the heirs of M. after the latter's decease, it was held that parol evidence was admissible to prove the partnership, and that the property was purchased with firm funds, and for the use thereof, and in pursuance of the partnership agreement. Scruggs *v.* Russell, McCahon (U. S.) 39.

What is sufficient proof of a partnership to deal in land, see Chester *v.* Dickerson, 54 N. Y. 1; affirming 52 Barb. 349.

(*n*) See Fox *v.* Clifton, 9 Bing. 117. Formerly the Court of Chancery used to direct an issue to try a disputed question of partnership or no partnership, if there was any real difficulty about it. See McGregor *v.* Bainbridge, 7 Hare 164, note, and the cases there cited, but this is no longer the practice.

3. **The question a mixed one of law and fact.**—What is a partnership, is a question of law; its existence is a question of fact. Beecham *v.* Dodd, 3 Harr. (Del.) 485; Gilpin *v.* Temple, 4 Id. 190; Doggett *v.* Jordan, 2 Fla. 541; Drake *v.* Elwyn, 1 Cai. (N. Y.) 184.

Whether a partnership existed between two or more persons is, after the facts are ascertained, a question of law; but a witness who knows the fact may, nevertheless, state, in so many words, that they were partners. The party against whom the testimony is offered, if he thinks the statement is founded on opinion merely, should interrogate the witness as to the sources of his knowledge. McGrew *v.* Walker, 17 Ala. 824.

Where the terms of the agreement and the facts are admitted, it is a question of law whether there was a partnership or not. Everitt *v.* Chapman, 6 Conn. 347; Terrill *v.* Richards, 1 Nott & M. (S. C.) 20.

Where the question as to whether, in a given case, a copartnership existed, depends upon inferences to be drawn and is a matter of doubt, the question is one of fact for the jury, under proper instructions. Butler *v.* Finck, 10 N. Y. Week. Dig. 163.

Where two creditors claimed the same fund, one as the creditor of A, B, C & Co., and the other under D and C, and there was evidence that they were composed of the same persons, and known under the different names, it was left to the jury to decide that fact. McDuffie *v.* Bartlett, 3 Pa. St. 317.

Where B and A purchased lands in the firm name, and so sold to C, and there was evidence that they had acted together in the purchase and sale of lands, B acting for the firm, and that A was satisfied with the sale to C of the land in controversy, the evidence was held sufficient to justify the submission of the question of partnership to the jury, and of the consent of B on behalf of the firm, that the deeds should be made to C's vendees. Bonner *v.* Campbell, 48 Pa. St. 286.

The defendant's evidence tended to show that B. and W. were not members of an association. Evidence tending to show that they were members was introduced by the plaintiffs. *Held*, that it was properly submitted to the jury, as a matter of fact, to determine whether or not they were members, and that in determining the question their intent and understanding in relation thereto, at the time they were alleged to have become members, as gathered from the evidence, was a material

In considering the evidence which it is necessary to adduce in order to establish the existence of a partnership, two perfectly distinct questions immediately suggest themselves, viz.:

1. What is to be proved?

2. How is it to be proved?

1. *What has to be proved in order to establish the existence of a partnership.*—With reference to the first question, the distinction between partnerships and *quasi* partnerships is all important, for it by no means follows that persons who are not partners are not liable as if they were; nor does it follow that persons who are liable as if they were partners are partners in reality. This has been already explained, and, in fact, the answer to the first of the above two questions will be found in that portion of the present work in which the nature of the contract of partnership was discussed.(*o*)

Proof of such a state of things as is sufficient to establish a *quasi* partnership is *prima facie* evidence of a real partner*ship,(*p*) but evidence which is insufficient to establish a *quasi* partnership must, *a fortiori*, fail to establish a real partnership between the same persons.

*84]

Sharing profits is only evidence of *quasi* partnership where agency may be inferred, and where the recent act 28 and 29 Vict., c. 86, does not apply. (*q*)

The distinction between existing and contemplated partnerships must not be overlooked; and it is obvious that if, in attempting to establish a *quasi* partnership, a real partnership should be shown to exist, the liability of the persons sought to be charged will only be established the more completely. [4]

consideration for the jury. Smith *v.* Hollister, 32 Vt. 695.

(*o*) See *ante* p. *7, *et seq.*

(*p*) See Peacock *v.* Peacock, 2 Camp. 45.

(*q*) See, as to this, *ante* p. *31.

4. What must be proved to establish a partnership.—To prove partnership, the evidence must be stronger as between partners than others. Robinson *v.* Green, 5 Harr. (Del.) 115.

The evidence to support the existence of a universal partnership alleged by a surviving partner must be very clear. Gray *v.* Palmer, 9 Cal. 616.

One who seeks to prove a parol contract of partnership against the representatives of a deceased person, is held to strict proof both of the existence of the partnership and of its terms. Kelly *v.* Devlin, 47 N. Y. Super. Ct. 555.

Evidence that a person was "interested" in a certain business is not sufficient to prove a partnership. Levy *v.* McDowell, 45 Tex. 220.

That A and B kept a public house, and that they both made purchases and bills in the management thereof in the name

2. *Means of proof.*—With reference to the means of proof, it is the province of a writer on evidence to discuss the method by which facts to be established may be proved; and it is not consistent with the plan of this work to examine the principles relative to the production or admissibility of evidence. At the same time, a few observations on some points of practical importance with respect to the mode of proving the existence of a partnership are laid before the reader, in the hope that they may be found of use. [5]

of "A & B," is not sufficient proof that they were partners. Banchor *v.* Cilley, 38 Me. 553. Compare Ripley *v.* Colby, 23 N. H. 438.

5. Means of proof, generally.—Partnership must be proved like any other fact, and cannot be established by mere surmise or innuendo. Hudson *v.* Simon, 6 Cal. 453. But it may be implied from circumstances (Kelleher *v.* Tisdale, 23 Ill. 405; Gilpin *v.* Temple, 4 Harr. (Del.) 190); and evidence that the parties are constructively partners supports the allegation. Rippey *v.* Evans, 22 Mo. 157.

Proof that two persons have been engaged together in the same undertaking, that they have sold goods, sued and been sued, jointly, is sufficient. Winslow *v.* Cheffelle, 1 Harp. (S. C.) Ch. 25. So is proof of an arrangement for carrying on business for a share in the profits, pursuant to an advertisement for a partner. Wilcox *v.* Matthews, 44 Mich. 192.

The plaintiff in an action on a promissory note, alleged to have been executed by the defendants as partners, may testify that when he accepted the note he believed them to be partners. Seekell *v.* Fletcher, 53 Iowa 330.

Where an attempt is made to charge one as a partner he may deny the fact of partnership, and his denial is admissible in evidence. Chambers *v.* Grout, 63 Iowa 342. But such denial will be ineffectual where the evidence discloses the essential elements of a partnership, such as community of interest, the sharing of profits and losses, &c. Cogswell *v.* Wilson, 11 Oreg. 371.

For the right to show that a pretended special partnership on the part of the plaintiffs is a mere sham, in order that defendant may prove a set-off against the one claiming to be the general partner, see Rosenberg *v.* Block, 102 N. Y. 255.

The alleged partner may be asked whether his alleged associates requested him to join them as a partner, and whether he declined, and whether he had or had not any interest in the capital or stock of the alleged firm. Adee *v.* Cornell, 25 Hun (N. Y.) 78.

Usage may make an incidental business so far the regular business of a partnership as to make all the partners in a firm bound by the contract of one in such incidental business. As, for example, the usage among the boatmen on a certain river to undertake to sell, as well as to carry, cotton, may make a firm engaged in the carrying trade responsible for the selling and bringing back the proceeds, as well as carrying cotton, upon a contract made between the owner of the cotton and one of the firm of boatmen. Galloway *v.* Hughes, 1 Bailey (S. C.) 553.

In an action for goods sold and delivered, the defendant introduced evidence to prove a partnership between the plaintiff and another not named in the writ. A question by the plaintiff to his clerks, "whether, from the manner in which his books were kept, and his conversations with the supposed partner, they had any

Where there is no writing.—As partnerships, even for long terms of years, very often exist in this country without any written agreement, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged

knowledge of such partnership," is improper, because leading. Snodgrass *v.* Broadwell, 2 Litt. (Ky) 353.

In *assumpsit* against several persons as partners, a part of the defendants filed a plea denying the partnership; and on the trial the court permitted to be read in evidence a paper in the handwriting of a former clerk of the association, purporting to contain a list of stockholders in a mercantile association, in which list the names of the defendants appeared. No proof was offered that the defendants had any knowledge of such paper, or that it was in the handwriting of the clerk of the defendants. *Held,* that the paper was inadmissible in evidence. Yocum *v.* Benson, 45 Ill. 435.

The fact that C. and S. entered into a written contract with F. and P. to excavate a certain tunnel is not conclusive evidence that S. was a member of the association known as C. & Co., who did actually prosecute the work on the tunnel; C. & Co. may have been subcontractors under C. and S. Sargent *v.* Collins, 3 Nev. 260.

General reputation.—As a general rule, evidence of general reputation is not admissible to prove a partnership. Wilson *v.* Coleman, 1 Cranch (U. S.) C. C. 408; Campbell *v.* Hastings, 29 Ark. 512; Sinclair *v.* Wood, 3 Cal. 98; Turner *v.* McIlhaney, 8 Cal. 575; Brown *v.* Crandall, 11 Conn. 92; Earl *v.* Hurd, 5 Blackf. (Ind.) 248; Grafton Bank *v.* Moore, 13 N. H. 99; McGuire *v.* O'Hallaran, Hill & D. (N. Y.) 85; Inglebright *v.* Hammond, 19 Ohio 337; Scott *v.* Blood, 16 Me. 192; Halliday *v.* M'Dougal, 20 Wend. (N. Y.) 81: Lockridge *v.* Wilson, 7 Mo. 560; Carter *v.* Douglass, 2 Ala. 499; Smith *v.* Griffith, 3 Hill (N. Y.) 333; Joseph *v.* Fisher, 3 Scam. (Ill.) 137; Goddard *v.* Pratt, 16 Pick. (Mass.) 412; Carlton *v.* Ludlow Woollen Mills, 27 Vt. 496. But see Halliday *v.* McDougall, 22 Wend.(N. Y.) 264. Nor can evidence of the contents of printed cards be given unless traced to the defendants. Wilson *v.* Colman, 1 Cranch (U. S.) C. C. 408.

However, in Benjamin *v.* Covert (47 Wis. 375), it was held that if plaintiff shows that a partnership existed between the parties sought to be charged as partners at a certain time, and was known to the public at the place of business of the firm, and that no notice of dissolution was ever given, he may further show that at the time of the transaction in question such partnership, to plaintiff's knowledge, was *generally reputed to continue,* and that the debt was contracted in the firm name and upon the credit of the firm, though after a dissolution in fact, it being then for the jury to determine whether the retiring partner had so acted after the dissolution as to hold himself out as still a partner, and had thus rendered himself liable. In this case the firm name was the same as the individual name of the person who continued the business, and the plaintiff had never done business with the firm during its actual existence.

And it has been held that such evidence is admissible in corroboration of other evidence tending to prove one to be a partner in a certain firm. Rizer *v.* James, 26 Kan. 221. So, also, it is competent upon the issue as to whether a member of a firm is a dormant partner. Metcalf *v.* Officer, 2 Fed. Rep. 640.

Again, evidence that it was not generally known, in the place of the partner-

partners themselves, the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents and other persons, by

ship, that the defendant was a partner of a certain house, is admissible, where the question is whether the plaintiff knew that the defendant was a partner in order to make him liable. Bernard *v.* Torrance, 5 Gill & J. (Md.) 383. And when a witness has stated what he has seen and heard, which tended to show the existence of a partnership, he may be asked what he has seen and heard to the effect that there was no partnership, in order to prove negatively that he had no information or knowledge that there was no partnership. Conklin *v.* Barton, 43 Barb. (N. Y.) 435.

What is insufficient proof of partnership by general reputation, see Gulke *v.* Uhlig, 55 How. (N. Y.) Pr. 434.

Presumption that partnership shown to have once existed continued to exist.—Where a partnership has been proved to have existed its continuance will be presumed, in the absence of proof or presumption to the contrary. Irby *v.* Brigham, 9 Humph. (Tenn.) 750. In such case, it will be presumed to continue until a dissolution is proved, and to have been on equal terms until the contrary is shown. Reybold *v.* Dodd, 1 Harr. (Del.) 401.

Thus, upon the question whether the defendants are partners here, evidence that they were partners in Europe is not so entirely irrelevant that its admission vitiates the verdict. Martin *v.* Ehrenfels, 24 Ill. 187.

So, also, where the matter to be proved is that a certain partnership existed at a given time, evidence of its existence some three months after that time is admissible in connection with other evidence. Fleshman *v.* Collier, 47 Ga. 253.

In an action upon a note, an issue being whether a partnership existed between the defendants, partnership articles were offered in evidence. *Held*, that they were not inadmissible because they only showed a partnership in January, 1857, when the note was made in October, 1858, as it was proper for the jury to have the articles before them, that they might decide when the partnership terminated. Pursley *v.* Ramsey, 31 Ga. 403.

Indirect evidence of partnership.—Where the existence of the partnership may be inferred from indirect evidence, a finding to that effect will not be disturbed for want of direct evidence. Henshaw *v.* Root, 60 Ind. 220.

Thus, where plaintiff sues several persons upon an account arising out of stock transactions claimed by him to have been joint on the part of defendants, but claimed by one of them to have been several, evidence that the defendant so claiming had a private account running at the same time is competent as tending to show that the other account was joint and not several. Quincey *v.* White, 63 N. Y. 370.

But one cannot be made a partner in fact or appearance, so as to bind him, unless by his consent, admissions or acts. The declarations or acts of others can have no such effect unless authorized or ratified by him Bishop *v.* Georgeson, 60 Ill. 484. Thus, the manner in which the books of a third person, seeking to charge one as a partner, were kept, is not competent evidence. McNamara *v.* Draft, 40 Iowa 413.

letters and admissions, and, in short, by any of the modes by which facts can be established. (*r*) [6]

**Informal documents.*—An agreement for a partnership may be evidenced by informal documents; as, for example, an unsigned memorandum or draft agreement acted on by the part- [*85

(*r*) As to the presumption arising from the joint retainer of solicitors, see Robinson *v.* Anderson, 20 Beav. 98, and 7 De G., M. & G. 239; Webster *v.* Bray, 7 Hare 159; McGregor *v.* Bainbrigge, Id. 164. And for cases in which a partnership has been inferred from a number of circumstances, see Nerot *v.* Burnand, 4 Russ. 247, and 2 Bligh (N. S.) 215; Jacobsen *v.* Hennekinius, 5 Bro. P. C. 482; Nicholls *v.* Dowding, 1 Stark. 81; Peacock *v.* Peacock, 2 Camp. 45. See, as to obtaining evidence from the solicitors of the alleged partners, Williams *v.* Mudie, 1 Car. & P. 158.

6. Proof of partnership where there are no articles.—Written articles are not necessary to constitute a copartnership which is to take effect immediately. Smith *v.* Tarlton, 2 Barb. (N. Y.) Ch. 336; Randell *v.* Yates, 48 Miss. 685; Buffum *v.* Buffum, 49 Me. 108; York *v.* Clemens, 51 Ind. 358; Villa *v.* Jonte, 17 La. Ann. 9. Where the partnership is to commence immediately, there need be no written agreement, even though it be agreed that the partnership shall continue longer than a year. Smith *v.* Tarleton, *supra.*

The fact that persons conduct business as copartners is *prima facie* evidence of such copartnership, either as between the copartners or as to third persons, and no written articles are required to be shown until they are proved to exist. Forbes *v.* Davison, 11 Vt. 660.

So, also, a partnership may be proved by parol evidence that the alleged partners severally admitted the fact, or held themselves out as such, and although it appear on the trial that there was a written agreement, and no notice to produce it is proved. Bryor *v.* Weston, 16 Me. 261; Anderson *v.* Levan, 1 Watts & S. (Pa.) 334; Gilbert *v.* Whidden, 20 Me. 367; Dixon *v.* Hood, 7 Mo. 414; King *v.* Ham, 4 Mo. 275; Field *v.* Tenney, 47 N. H. 513; Widdifield *v.* Widdifield, 2 Binn. (Pa.) 245. To the contrary, see Thornton *v.* Kerr, 6 Ala. 823. And the amount of capital furnished by each partner, and the manner of paying it in, may be proved by other evidence than the articles. Boyers *v.* Elliott, 7 Humph. (Tenn.) 204.

Even after notice to produce the articles, creditors have a right to prove the existence of a partnership, by parol, but the partners must produce the written agreement, and cannot offer parol proof of its contents by the creditors' deponent, either as cross-examination or as a continuation of his deposition. Hastings *v.* Hopkinson, 28 Vt. 108. Thus, where partners, when sued, seek to establish the existence of the partnership, they must produce the letters of partnership, or give a legal excuse for their non-production, before the partnership can be proved by other evidence. Bonnaffee *v.* Fenner, 6 Smed. & M. (Miss.) 212. And in such an action parol evidence to show that articles of copartnership executed by the defendants were to go into operation only upon a contingency, is inadmissible. Dix *v.* Otis, 5 Pick. (Mass.) 38.

In Wilson *v.* Lovelace (49 Iowa 558), W. entered into a parol contract of copartnership with defendants, but when the articles were prepared, his son was, at his request, permitted to sign them upon his assurance that he was to remain the real party to the agreement, the son's name being used only to conceal his association with the firm. The conditions of the parol contract were fully performed, while the

ners, (*s*) or a series of letters. Moreover, an agreement between A and B may disclose a trust for C, and be evidence for him, and show him to be a partner. (*t*) [7]

A prospectus or advertisement, issued by one person and assented to by another, is abundant evidence of a contract upon the terms contained in the prospectus or advertisement. (*u*)

Acts of alleged copartner.—When it is sought to make a person liable, as if he were a partner, evidence must be adduced of his acts, or of what has been done by other people with his knowledge or with his consent, and the plaintiff must prove a holding out to himself. (*x*) The statements and acts of the defendant's alleged copartners are no

son's connection with the partnership was in fact treated as a nullity. *Held*, that W. was liable as a partner.

(*s*) Baxter *v.* West, 1 Drew. & S. 173; Worts *v.* Pern, 3 Bro. P. C. 548 (vol. 1, p. 270, in folio ed.); Williams *v.* Williams, 2 Ch. 294. See, as to mutual insurance societies, *ante* p. *80, note (*a*).

(*t*) As in Dale *v.* Hamilton, 2 Ph. 266. See, also, Murray *v.* Flavell, 25 Ch. D. 89; Page *v.* Cox, 10 Hare 163.

7. Informal documents.—A partnership agreement in writing, but not executed, is not evidence of the terms and conditions of the partnership. Tweed *v.* Lowe, 1 Ariz. T. 488. But see, to the contrary, Eager *v.* Crawford, 76 N. Y. 97. But a written agreement, which alone would not constitute a partnership, may be put in evidence, together with proof that the parties have considered it to constitute one, and have acted accordingly. Williams *v.* Soutter, 7 Iowa 435. And in a suit against several defendants as copartners it is the privilege and duty of the plaintiff to establish the connection of each one of the defendants with the firm, and for this purpose an unsigned partnership agreement between the defendants, and in the handwriting of one of them, is admissible against him. Beall *v.* Poole, 27 Md. 645.

In proving articles of association, where there is no provision or condition as to the number who shall sign the agreement to make it valid, it is sufficient to prove the signatures of those associates who are parties to the suit against whom it is offered in evidence. Beach *v.* Vandewater, 1 Sandf. (N. Y.) 265.

In California no particular form of acknowledgment to a certificate of partnership is required. Fabian *v.* Callahan, 56 Cal. 159.

A and B cannot be proved to be partners, generally, by the production in evidence of an agreement between them to do a particular piece of work together, unless the plaintiff can show that when he sold the goods for the price of which he sues, he knew of the agreement and acted on the faith of it. Denithorn *v.* Hook, 112 Pa. St. 240.

Where one has not in any manner been held out as a partner, and a plaintiff, seeking to charge him as such, produces a written agreement between the parties to prove the partnership, the whole of it must be read together. Plaintiff cannot be permitted to use such parts of the agreement as tend to establish a partnership, and reject such parts as tend to show the contrary. Manhattan B. Manuf. Co. *v.* Sears, 1 Sweeney (N. Y.) 426.

(*u*) Fox *v.* Clifton, 6 Bing. 797, 798.

(*x*) Dickinson *v.* Valpy, 10 Barn. & C. 140, *ante* p. *42.

evidence against him until he and they are shown to have been connected in some way with each other; and it is obviously reasoning in a circle to infer a partnership from acts of theirs, unless he and they can be connected by other evidence admissible against him. (*y*) [8]

(*y*) See 1 Tay. on Ev. (8th ed.), § 753; Edmundson *v.* Thompson, 2 Fost. & F. 564, and 8 Jur. (N. S.) 235; Grant *v.* Jackson, Peake 268.

8. Acts and declarations of alleged copartners.—The assent of each member of a copartnership is necessary to bind him as a member of a new firm, but his express assent need not be proved to bind him; it is sufficient to show that he knew of such new arrangement and made no objection thereto; and though a partner, in fact, withdraws from the old firm before the formation of the new, but gives no notice thereof, and suffers his name to remain in the firm, he may be held for the contracts of the new concern. Tabb *v.* Gist, 1 Brock. (U. S.) 33.

Evidence of specific acts of intermeddling in the affairs of a firm is admissible to prove a partnership; but the general evidence that a person has intermeddled is not admissible. Lewis *v.* Post, 1 Ala. 65.

A note payable to partners in their individual names, and assigned by one of the partners in the name of the firm, may be given in evidence by the assignee in a suit against the maker, without proof of the authority of the partner who assigned it, although "non-assignment" is pleaded. Mick *v.* Howard, 1 Ind. 250.

Thus, where two persons carry on the smithing business together, this is *prima facie* sufficient evidence of a partnership between them. McMullan *v.* Mackenzie, 2 Gr. (Iowa) 368. But the declarations of the alleged partners, unaccompanied by acts, and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor. Phillips *v.* Purington, 15 Me. 425.

Proof that alleged partners acted as such before and after the date of a note is proper evidence to be left to the jury in determining the fact of partnership at that time. Gilbert *v.* Whidden, 20 Me. 367.

But proof that a person was frequently seen in the counting-house of another, transacting business as principal, and that he was generally supposed, believed and understood to be a partner in the house of such other, was held insufficient to prove that he was a partner with such other person. Bryden *v.* Taylor, 2 Har. & J. (Md.) 396.

The acts and declarations of a person not a partner are not admissible to charge him as a partner, without showing that they were brought home to the plaintiff's knowledge. Fitch *v.* Harrington, 13 Gray (Mass.) 468.

On proof that subscribers for the capital stock of an unincorporated joint stock company paid, without objection, assessments for the shares set opposite their names, there being no showing by whom their names were subscribed, such subscribers are liable as copartners for the debts of the company. Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; Frost *v.* Walker, 60 Me. 468.

The fact that one did not assert to a boarder in a hotel that he was a partner in the business of keeping the hotel is incompetent to disprove the partnership. Marvin *v.* Dutcher, 26 Minn. 391.

The acts and declarations of a defendant, sued as a partner, but on whom the writ has not been served, may be given in evidence to prove him to be a partner. Grafton Bank *v.* Moore, 14 N. H. 142.

Evidence that one was often in the store conducted in the name of another; that he bought, sold and bartered goods there; inspected the books and made

Registers, &c.—Upon this principle it has been held that the registers of ships are no evidence of ownership, except as against the per-

charges, and went to Boston and bought goods for the store, is evidence to prove that he was a partner, he having formerly been a partner, and the old sign of the firm still remaining upon the building. State *v.* Wiggin, 20 N. H. 449. S. P., Dobson *v.* Chambers, 78 N. C. 334.

Partnership, or joint liability between two persons living together upon a farm, may be inferred from evidence that one of them has been in the habit of ordering goods for their common use, labor and materials for the improvement of buildings in their joint occupancy, and mechanics' work ordinarily incident to farming operations; and that the debts contracted by him have in various instances been paid by the products of the farm, in the sale of which both participated; and from the admission of one of them that on some occasions the other had authority to act for both, although he reserved the right to disavow such acts as he might deem disadvantageous. Farr *v.* Wheeler, 20 N. H. 569.

Where the acts and declarations of a defendant have been shown, in order to charge him as a partner, he may testify what his motive was in doing what he did; *e. g.*, to aid two of his relatives who were members of the firm. Tracy *v.* McManus, 58 N. Y. 257.

In determining whether a partnership as to third persons exists, all the declarations by word or act, of the supposed partners, the rights they have exercised, and every circumstance attending the transaction, may be proved by third persons, and must be considered in determining what is the true relation between the supposed partners. Pierson *v.* Steinmyer, 4 Rich. (S. C.) 309.

Instances and illustrations.—In a suit against L. as a partner in a firm known by the name of L. & B., letters written in the name of the firm by L., and entries made by him in the books of L. & B., are *prima facie* admissible in evidence to charge him as a partner. Lewis *v.* Post, 1 Ala. 65.

When it was proved that A was in a store and sold goods for cash and on credit, in order to raise the presumption that A was a partner—*Held*, that it was proper to ask witness if it is not customary for clerks to sell in this way, as well as principals. Perry *v.* Butt, 14 Ga. 699.

A and B held themselves out as partners by advertisements. A purchased of one, who supposed them to be partners, goods within the business of the pretended firm, though as matter of fact, A did not intend to bind B by the purchase. *Held*, that B was liable, unless the vendor knew that B was not concerned in the purchase. Booe *v.* Caldwell, 12 Ind. 12.

Where it was sought to charge defendants as partners owning a mill, plaintiff introduced evidence tending to show that one of them exercised authority about the mill. *Held*, that by way of rebutting the inference that he was interested as a copartner, it was proper to show that others gave like directions; but not to prove his statements disclaiming such interest. Sager *v.* Tupper, 38 Mich. 259. See, also, Callender *v.* Swett, 14 Vt. 160.

In Ruhe *v.* Burnell (121 Mass. 450), on the issue whether two persons were partners at the date of an alleged sale of goods to them, evidence of writings thereafter executed between them, and of one's declaration to the other, were held inadmissible.

When, in an action to charge, with a firm debt, one who has held himself out to be a member of the firm, the declarations of the person to whom the goods were sold are admissible as against the person sought to be charged, see Green-

sons upon whose affidavit the entries in the registers were made; (*z*) that entries in the office in Somerset House for licensing stage-coaches are no evidence to prove that the persons named in the license are the owners of the coach; (*a*) and that the acts, letters and statements of one promoter of a company are no evidence against another, who cannot be shown to have authorized them. (*b*) 9

wood *v.* Sias, 21 Hun (N. Y.), 391.

(*z*) Tinkler *v.* Walpole, 14 East 226; Flower *v.* Young, 3 Camp. 240; and see McIver *v.* Humble, 16 East 174.

(*a*) Strother *v.* Willan, 4 Camp. 24; Weaver *v.* Prentice, 1 Esp. 369.

(*b*) See Drouet *v.* Taylor, 16 C. B. 671; Burnside *v.* Dayrell, 3 Ex. 224; Watson *v.* Charlemont, 12 Q. B. 856. This will be again alluded to in a subsequent chapter.

9. **Judgments and records of former suits.**—A former judgment between the same parties on both sides, in which the defendants were described as partners under a given firm name, is competent evidence, in a subsequent suit, to prove the defendants partners under the same name. Dutton *v.* Woodman, 9 Cush. (Mass.) 255. And where an action is brought against several persons as partners, and they omit to make any defence, and allow judgment to be taken against them by default, the record of such judgment is proper evidence of the existence of the partnership, in another action afterwards brought against the same persons by different plaintiffs. Marks *v.* Sigler, 3 Ohio St. 358; Cragin *v.* Carleton, 21 Me. 492; Fogg *v.* Greene, 16 Me. 282; Ellis *v.* Jameson, 17 Me. 235.

But it is held that a verdict, and judgment thereon, are not admissible evidence of a copartnership, even where that fact was expressly put in issue by the pleadings, unless the action, in which such evidence is offered, is between both the parties to the former suit. Burgess *v.* Lane, 3 Greenl. (Me.) 165.

In an action by an attorney for professional services, evidence that the defendants were described in the writ in the former suit as partners is not sufficient to charge them jointly in the present case, without proof that they had notice of the existence of the former suit during its pendency. Prentiss *v.* Kelley, 41 Me. 436.

On the trial of an action brought against several as partners, only one of whom has been served with process, on the question who constituted the partnership, the record of a former action against the defendant served with process, in which he pleaded in abatement the non-joinder of the present defendants, is competent evidence. M'Clelland *v.* Lindsay, 1 Watts & S. (Pa.) 360.

In a suit against a firm on a promissory note, purporting to be signed by the firm name, a copartner pleaded that he was not a member of the firm at the time the note bore date. *Held*, that evidence of suits and judgments, in which he was joined as a partner, by and against the copartnership, prior to the date of the note, was inadmissible to rebut this plea. Collier *v.* Cross, 20 Ga. 1.

Books and accounts of alleged firm.—The firm books are not alone competent evidence to prove the partnership; but they are evidence in connection with other proof of partnership, and of access to and knowledge of their contents. Bryce *v.* Joynt, 63 Cal. 375; S. C., 49 Am. Rep. 94. Entries in the books are not evidence against any one to show him to be a partner in the firm. Robins *v.* Warde, 111 Mass. 244; Abbott *v.* Pearson, 130 Id. 191. But the books may be given in evidence to fortify or discredit a witness who swears

*86] *It need scarcely be observed that the principle now under discussion does not apply to exclude the testimony of a person deposing to the existence of a partnership between himself and another. Such testimony was not excluded even before the alteration of the law relating to the competency of witnesses, (*c*) and there is no pretence for excluding such testimony now. If a partnership is alleged to exist between A and B, and A is called to prove it, and he denies it, then, although the person calling A as a witness cannot adduce evidence to show that his testimony is generally unworthy of credit, yet such person may adduce other evidence to show that the partnership denied by the witness does, in point of fact, exist. (*d*)

Acts of copartners after prima facie evidence of partnership has been

to the partnership. Moyes *v.* Brumeaux, 3 Yeates (Pa.) 30.

Where, however, a person has suffered his name to be held out to the world as a member of a mercantile firm, and permitted persons to deal on the credit of the firm, he cannot object to the admission in evidence, as proof of the partnership, of books kept and accounts rendered in the name of the firm. Chidsey *v.* Porter, 21 Pa. St. 390.

The continuance of the partnership relation may be proved notwithstanding the publication of a notice of dissolution; and entries made thereafter in the partnership books are admissible to charge the partner making them. Gilchrist *v.* Brande, 58 Wis. 184.

Where an administratrix of one estate brought a claim against another estate, and the defence gave evidence tending to show that the decedents were in partnership, and that defendant's intestate kept the accounts, a book of accounts in the latter's handwriting and containing entries purporting to have been made in the presence of the other partner, was held admissible as tending to prove the copartnership and the condition of the accounts. Howard *v.* Patrick, 38 Mich. 796. See, also, Hale *v.* Brennan, 23 Cal. 511.

Plaintiff's books, and books of third parties.—After evidence of partnership has been introduced, the plaintiff's books, containing original entries, may be given in evidence. Johnston *v.* Warden, 3 Watts (Pa.) 101; Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

The headings in a measurer's abstract book, showing that the defendant was charged for the work measured, as debtor to the plaintiff and another, are inadmissible as evidence for the defendant for the purpose of proving a technical partnership between the plaintiff and such other party, there being no offer to connect them with other evidence going to show the existence, at any time, of such partnership. Green *v.* Caulk, 16 Md. 556.

Where a creditor seeks to charge a defendant as a member of a debtor firm, neither the reports of a mercantile agency, nor declarations of other third persons, are competent evidence to charge such defendant as a partner. Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135.

Such reports are not admissible, unless knowledge, or means of knowledge, of them is brought home to the party attempted to be charged. Campbell *v.* Hastings, 29 Ark. 512; Bonnell *v.* Chamberlain, 26 Conn. 487.

(*c*) Hall *v.* Curzon, 9 Barn. & C. 646; Blackett *v.* Weir, 5 Id. 385.

(*d*) Ewer *v.* Ambrose, 3 Barn. & C. 746.

given.—Further, it is to be observed that notwithstanding the principle above stated, after sufficient evidence has been given to raise a presumption that several persons are partners, then the acts of each of those persons are admissible as evidence against the others, for the purpose of strengthening the *prima facie* case already established. Thus, in Norton *v.* Seymour, (*e*) in order to prove a partnership between the defendants, Seymour and Ayres, the plaintiff called a witness, who deposed that Ayres had, in conversation, admitted the partnership, and then the plaintiff gave in evidence a circular and invoice issued by Seymour, and headed "Seymour and Ayres," and stating that the business would in future be carried on in those names. Ayres objected to the admissibility of this document, there being, as she contended, no evidence to connect her with it; but the court held it to be admissible; for, before the document was put in, evidence of a partnership had been given, and the document tended to confirm that evidence. So, in Nicholls *v.* Dowding, (*f*) *prima facie* evidence of a partnership having been given, the declarations of one of the defendants were inquired into for the purpose of binding the others, and it was held that such evidence was admissible, a foundation for it having been previously laid. (*g*) [10]

(*e*) 3 C. B. 792.

(*f*) 1 Stark. 81.

(*g*) See, too, Alderson *v.* Clay, 1 Stark. 405.

10. **Acts of copartners after prima facie proof, &c.**—A partnership must first be proved *aliunde*, before the declarations of one partner can affect the other; and evidence to show a continuance of a partnership, after it has been dissolved, with notice to the parties, must be as satisfactory as that required to show its establishment. Allcott *v.* Strong, 9 Cush. (Mass.) 323. But after *prima facie* evidence of partnership, the declarations of one of the partners are evidence to bind the firm, although made on oath voluntarily by him, under the South Carolina summary process. Allen *v.* Owens, 2 Spears (S. C.) 170.

Accordingly, evidence that legal services were rendered in the joint names of an attorney-at-law and another person, is not sufficient to prove a partnership between them, and thus defeat an action for such services brought by the attorney alone. Bishop *v.* Hall, 9 Gray (Mass.) 430.

So, also, the rescission or modification of a partnership agreement cannot be proven by loose declarations or conversations, especially when the subsequent conduct of the parties accords with their original contract. Autrey *v.* Frieze, 59 Ala. 587.

Where one was a partner in 1855 and 1857, but claimed that for 1856 he was not, his withdrawal being evidenced by a deed which was lost, and it turned out that he himself had destroyed the deed, and he answered delusively about it, and it appeared that he had acquiesced in certain acts of his partner, treating him as such, it was held that he was to be considered as a partner in 1856 also. Clements *v.* Mitchell, 6 Jones (N. C.) Eq. 171.

[*87 **Proof of articles, &c., not necessary.*—A person may be made liable as if he were a partner without the proof of any partnership articles or deed which he may have executed. (*h*) And although, in order to prove an actual partnership, it may be necessary, by the law of some other country, to show that some formality has been observed, the non-observance of that formality will not prevent persons who in fact trade as partners from being so treated in this country in questions arising between them and third parties. (*i*) [11]

Admissions.—An admission made by any one that he is a member of a particular partnership is evidence of that fact against him; (*k*) and such an admission renders it unnecessary for the purpose of fixing him with the liabilities of a partner, to show that he executed any document whereby he became a partner. (*l*)

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions. This seems to have been the true ground of the decision in the much debated case of Vice *v.* Anson. (*m*) There the defendant supposed herself to be a shareholder in a mine; she had, in private letters and in private society, written and spoken of herself as a shareholder; she had received certificates stating that her name

A sued B and C, as the owners, in partnership of a race-course, for work done thereon. C denied, under oath, the partnership, and after proof of a written agreement between B and C, for the construction of the course at joint expense and profit, A offered to prove that although he was employed by B to do the work, yet that C was often present, giving orders and directions concerning it, and shared the profits of the course after it was completed. *Held*, that the proof was admissible as tending to establish the partnership, and their joint liability as partners for the work. Perry *v.* Randolph, 14 Miss 335.

(*h*) Alderson *v.* Clay, 1 Stark. 405, where a person was proved to be a member of a company without the production of the company's deed.

(*i*) Shaw *v.* Harvey, Moo. & M. 526; Maudslay *v.* Le Blanc, 2 Car. & P. 409, note.

11. Proof of articles, &c., not necessary.—After receiving the services of one as a partner, and recognizing him as such for several years, it is too late to set up either the non-payment of his portion of the capital stock or the non-execution of articles of partnership as proof that no partnership existed. Campbell *v.* Whitley, 39 Ala. 172.

(*k*) Sangster *v.* Mazarredo, 1 Stark. 161; Studdy *v.* Saunders, 2 Dowl. & R. 347; Clay *v.* Langslow, 1 Moo. & M. 45.

(*l*) Harvey *v.* Kay, 9 Barn. & C. 356; Ralph *v.* Harvey, 1 Q. B. 845; and see Tredwen *v.* Bourne, 6 Mees. & W. 461.

(*m*) 7 Barn. & C. 409, and Moo. & M. 98. See, on this case, Owen *v.* Van Uster, 10 C. B. 318, and *qu.* if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? And what more was necessary to make her liable to the supplier?

was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not, in point of fact, any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

*88] *The inconclusive nature of an admission was distinctly recognized in Ridgway *v.* Philip, (*n*) where Parke, B., said: "It frequently happens in cases where the liability of persons as partners comes in question, that juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, as far as regards his own interest, to contradict it by evidence." In that case, one of the defendants was allowed to explain an admission made by him to the effect that he was in partnership with the others. (*o*) So, where the freighters of a ship addressed a letter to the captain instructing him on his arrival at the Cape to call upon their managing partner, Mr. W. G. Anderson, it was held competent to the freighters to show that Mr. Anderson was not a partner of theirs. (*p*)

Even where a person has executed a deed describing him as a partner, the admission is not necessarily conclusive against him. (*q*)

An admission by one person that he and another are partners, may be open to the explanation that they are partners to some limited extent, or with respect to some particular transaction, but not to the extent or with respect to the business necessary to sustain the case made against him. (*r*) [12]

(*n*) 1 Cr., M. & R. 415.

(*o*) See, too, Newton *v.* Belcher, 12 Q. B. 921; Newton *v.* Liddiard, Id. 925, as to the admissions made by promoters of companies as to their liabilities.

(*p*) Brockbank *v.* Anderson, 7 Man. & G. 295. The real question was whether Anderson was an interested witness, which he would have been had he been a partner. See Mant *v.* Mainwaring, 8 Taunt. 139; Brown *v.* Brown, 4 Id. 752.

(*q*) See Radcliffe *v.* Rushworth, 33 Beav. 485; Empson's Case, 9 Eq. 597.

(*r*) See Ridgway *v.* Philip, 1 Cr., M. & R. 415, and De Berkom *v.* Smith, 1 Esp. 29.

12. Admissions.—The separate admission of each member of an alleged partnership is competent evidence against him, but not against the other supposed members, to prove the partnership. Currier *v.* Silloway, 1 Allen (Mass.) 19; Gordon *v.* Bankard, 37 Ill. 147; Drennen *v.* House, 41 Pa. St. 30; King *v.* Barbour, 70 Ind. 35. See, also, Filley *v.* McHenry, 71 Mo. 417; Brown *v.* Rains, 53 Iowa 81; Fick *v.* Mulholland, 48 Wis. 413; Flournoy *v.* Williams, 68 Ga. 707. Thus, where three partners are sued, one of whom pleads, the plaintiff cannot give the declarations of the others to prove the partner-

Retrospective articles, &c.—Again, persons may agree that as between themselves, the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of

ship. Nelson *v.* Lloyd, 9 Watts (Pa.) 22; Sherman *v.* Kelton, 2 R. I. 532.

But it is held that the successive acts and declarations of each of several defendants, showing their partnership, are equivalent to a joint declaration to that effect by all, and may be given in evidence. Haughey *v.* Strickler, 2 Watts & S. (Pa.) 411; Welsh *v.* Speakman, 8 Id. 257.

The true rule is that the declarations of one of several alleged partners cannot be given in evidence to prove a partnership, except as against the party making them (M'Pherson *v.* Rathbone, 7 Wend. (N. Y.) 216; Yancey *v.* Mariott, 1 Sneed (Tenn.) 28), until independent proof of the partnership has been made. Cross *v.* Langley, 50 Ala. 8; Converse *v.* Shambaugh, 4 Neb. 376. And such declarations, if made at the time the debt of plaintiff was contracted, are admissible to prove that plaintiff relied on the existence of the alleged partnership. Greenwood *v.* Sias, 21 Hun (N. Y.) 391.

Where the question before the jury is whether the defendant is a member of a certain partnership, it is proper for the court to exclude the declarations of the defendant not made in the presence of the plaintiffs or their agent. Teller *v.* Patten, 20 How. (U. S.) 125. But where the pleadings show that the several defendants were jointly employed by the plaintiff, the admission of one of the defendants is competent to charge the other defendants as his copartners, and it is immaterial whether such admission is made in a judicial proceeding or otherwise. And objection to such evidence on the ground of want of previous proof of partnership is removed by subsequent testimony tending to prove that fact. Fogerty *v.* Jordan, 2 Robt. (N. Y.) 319.

Upon the question what amounts to such an admission of the existence of a partnership as to be admissible, it has been held that if defendants, sued as copartners, introduce in evidence a receipt taken by them, in their copartnership name, of the plaintiffs, this is an admission of the copartnership. M'Farland *v.* Lewis, 2 Scam. (Ill.) 344.

And that where the suit is on an account stated, evidence that defendants admitted that they were partners should be allowed to go to the jury, even though not specifically confined to the time within which the account accrued. Sager *v.* Tupper, 38 Mich. 258.

On the other hand, it has been decided that an inventory filed by one partner after the death of the other, which imports to contain the assets of the firm, is no more than an implied admission of the partnership, made after its dissolution. Such inventory is not evidence either to prove the partnership as against the decedent, or to bind the partnership creditors as against the individual creditors of the decedent. Bond *v.* Nave, 62 Ind. 506.

So, also, it is held that under the plea of *non est factum*, involving the existence of a partnership, the declaration of the defendant to third persons, before the execution of the instrument in question, that no partnership existed, is not evidence. What the defendant said when the note was offered to him for payment would be evidence, such declaration being a part of the *res gestæ*. England *v.* Burt, 4 Humph. (Tenn.) 399.

The following admissions have been held admissible and sufficient to prove partnership:

An admission by one that a note was signed by his partner, and an offer to pay it if the holder would take goods. Thomas

such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership, in point of fact, began. As to third parties, such an agree-

v. Wolcott, 4 McLean (U. S.) 365.

The unexplained failure of one sought to be charged as a partner to reply to a letter written at the time of a sale of goods to the alleged firm, in which he was addressed as a partner. Humes *v.* O'Bryan, 74 Ala. 64.

The defendant's acknowledgment of the partnership of the plaintiffs. Bisel *v.* Hobbs, 6 Blackf. (Ind.) 479.

Proof of frequent admissions, in conversations, of the existence of a copartnership, supported by entries in books kept by the parties. Wallace *v.* Berger, 14 Iowa 183.

The testimony of a witness that he has paid notes to the firm, in which were the individual names of the members, and the declarations of the members made prior to the institution of the suit. Woods *v.* Quarles, 10 Mo. 170.

The admission of a party that "he was one of the proprietors of the firm of Adams & Co.'s Express," and that the signature of a receipt was that of one of their clerks. Fenn *v.* Timpson, 4 E. D. Smith (N. Y.) 276.

The following have been held inadmissible:

Admissions by one partner, after dissolution, not made in the winding up, or in relation to the dissolution. Nichols *v.* White, 85 N. Y. 551.

A letter of one partner, admitting the existence of the partnership. Porter *v.* Wilson, 13 Pa. St. 641.

Instances and illustrations.—Plaintiff sought to charge a defendant as a partner in a stage-line, by evidence of his declarations at different periods, the earliest declarations admitting the partnership, and the later ones denying it. Plaintiff also offered to show that at the time of defendant's denial, another line had been started on the same road, and that in consequence of the competition the charge for passengers had been greatly reduced. *Held*, that this latter evidence did not impair the weight of the declarations last made by defendant, but was irrelevant and was rightly rejected. Anderson *v.* Snow, 9 Ala. 247.

Where A and B were sued as partners, A was defaulted, and B pleaded the general issue. *Held*, that letters written by A, in the firm name, could not be read in evidence by B, to show that he was not a partner with A, but that the letters of the plaintiff were good evidence to show that he did not consider B as such partner. Champlin *v.* Tilley, 3 Day (Conn.) 303.

Where A subscribed to a contract of sale the name of a firm, of which he claimed to be a member, and B, the other partner, afterwards ratified the act, by receiving the purchase money, &c. *Held*, that this confirmation of B being established, A's declarations as to the partnership, made when the contract was executed, may be given in evidence. Drumright *v.* Philpot, 16 Ga. 424.

A told B that he was in partnership with C, and B so informed C, who did not reply. *Held*, sufficient proof that A and C were partners. Slade *v.* Paschal, 67 Ga. 541.

In an action against V. and B. upon a note signed "V. & Co.," the testimony of a witness that he presented the note for payment to B., who stated that the demand was just and that he would pay it in a short time, is sufficient evidence for the court to infer that B. was a partner of V. Vance *v.* Funk, 2 Scam. (Ill.) 263.

Two persons purchased a mill and house, which they commenced to remove, but, before the removal was completed, one of them died. *Held*, that the general

ment is *res inter alios acta*, which does not affect them in any way; (*s*) and it is obvious that an admission of *the existence of a partnership might be explained as true only in this limited [*89 sense, in which case the admission might be worth nothing.

Usual evidence of partnership.—The following is the kind of evidence usually had recourse to for the purpose of proving the existence of an alleged partnership or *quasi* partnership:

Agreements in writing and deeds showing the right to share profits. If the signature to a deed is proved, its due execution is inferred. (*t*) To prove who constituted a firm of A & Co., the attorney of B & Co. cannot be compelled to produce an agreement made between A & Co. and B & Co., if he objects on the ground of professional confidence. (*u*) [13]

Admissions, (*x*) as to which, see *ante* pp. *87, *88.

declarations of the deceased that the two had bought the mill in partnership, no terms of partnership being stated, were not sufficient evidence of a partnership, as such declarations might well consist with the existence of no more than a tenancy in common. Gregory *v.* Martin, 78 Ill. 38.

Plaintiffs advised defendants of a purchase made by one A, claiming to be a partner in their firm. Defendants answered, promising to settle plaintiff's account, saying, "We will make the arrangement, &c. We thought it settled before, as we sent the money by A last winter," &c. *Held*, that these admissions, as tending to show a partnership, were sufficient to entitle the plaintiffs to recover. Cleghorn *v.* Johnson, 11 Iowa 292.

Where, on a trial involving the question whether A was the partner of B, it appeared that on one occasion A was asked whether he was "in company in the store with B," and answered "Yes;" and the jury returned a verdict negativing the fact of a partnership, the court set aside the verdict, and granted a new trial. Palmer *v.* Pinkham, 33 Me. 32.

Although the bare declarations of B and C that A was their partner are insufficient to charge him, their acknowledgments that articles of copartnership existed between them and A, which they refused to produce upon the trial, after due notice, were held evidence from which a jury might reasonably infer that, if produced, they would have shown the fact of a partnership. Whitney *v.* Sterling, 14 Johns. (N. Y.) 215.

(*s*) Wilsford *v.* Wood, 1 Esp. 182; Vere *v.* Ashby, 10 Barn. & C. 288. The subject will be more fully examined in book II., ch. 2, § 3.

(*t*) Grellier *v.* Neale, 1 Peake 198.

(*u*) Harris *v.* Hill, Dowl. & R. N. P. Cas. 17.

13. A mortgage deed of a partnership, relating to partnership business, executed by one of the firm, in the firm name, is evidence competent to be given to prove the existence of the partnership, though the deed was for a purpose foreign to the particular transaction or contract in the suit, where such evidence is sought to be introduced. Crowell *v.* Western Reserve Bank, 3 Ohio St. 406. See, also, Thomas *v.* Moore, 71 Pa. St. 193.

(*x*) Sangster *v.* Mazarredo, 1 Stark. 161; Harvey *v.* Kay, 9 Barn. & C. 356; Ralph *v.* Harvey, 1 Q. B. 845; Clay *v.* Langslow, 1 Moo. & M. 45.

Advertisements, prospectuses, &c., containing the names of the alleged partners, (*y*) and names over doors, (*z*) and on carts. (*a*) [14]

Answers in chancery containing admissions. (*b*)

Bills to customers,
Circulars,
Invoices,
} containing the names of the alleged partners. (*c*) [15]

Bills of exchange. The mode in which these have been drawn, accepted or endorsed has frequently been relied on with success. (*d*) [16]

(*y*) Lake *v.* Argyll, 6 Q. B. 477; Bourne *v.* Freeth, 9 Barn. & C. 632; Maudslay *v.* Le Blanc, 2 Car. & P. 409, note; Reynell *v.* Lewis, 15 Mees. & W. 517; Wood *v.* Argyll, 6 Man. & G. 928. In Ex parte Matthews, 3 Ves. & B. 125, an advertisement of dissolution was relied on.

(*z*) Williams *v.* Keats, 2 Stark. 290. See, too, Pott *v.* Eyton, 3 C. B. 32, *ante* p. *30.

(*a*) Stables *v.* Eley, 1 Car. & P. 614, as to which, see *ante* p. *47.

14. The following advertisement shows a partnership: "People's Bank Stockholders; * * * every stockholder individually responsible for all liabilities." Uhl *v.* Harvey, 78 Ind. 26.

So, also, a subscription to the stock of a company in the partnership name may be given in evidence. Allen *v.* Rostain, 11 Serg. & R. (Pa.) 362.

But an instruction to the jury that the presumption of a partnership from the use of a name such as is commonly used where a partnership exists, is slight and easily rebutted, affords no ground of exception. Charman *v.* Henshaw, 15 Gray (Mass.) 293.

The fact that printed hand-bills, with the name of the firm signed thereto, were posted at various places in the town where defendant resided, and that one of them was posted on the door of the house where he boarded, is competent to be submitted to the jury. Tomlin *v.* Goldsmith, 40 Ga. 221. See, also, Barcroft *v.* Haworth, 29 Iowa 462.

(*b*) Studdy *v.* Saunders, 2 Dowl. & R. 347; Grant *v.* Jackson, 1 Peake 268.

(*c*) Young *v.* Axtell, 2 H. Bl. 242; Norton *v.* Seymour, 3 C. B. 792.

15. It is competent to show how the supposed firm made out their accounts, kept their books, and even marked boxes of merchandise; but to make such proof available it must be shown that the party against whom it is offered had some agency in these acts, or impliedly or expressly sanctioned or approved them. McNeill *v.* Reynolds, 9 Ala. 313. But when the partnership of D. and M. was the question in issue, it was held that bills of goods made out against D. alone, and found in a drawer in the room where the business was carried on, were inadmissible on behalf of M. to prove that no copartnership existed between them. McNamara *v.* Draft, 33 Iowa 385.

In Thomas *v.* Moore (71 Pa. St. 193), where B. sold part of a coal lease with the personal property to M., who constituted O. his attorney, it was held that orders drawn for goods by B. on a firm, "B. & Co.," in favor of the plaintiffs, accepted by O., and proof that goods were furnished accordingly, were evidence of partnership between B. and M.

(*d*) Spencer *v.* Billing, 3 Camp. 310; Guidon *v.* Robson, 2 Id. 302; Duncan *v.* Hill, 2 Brod. & B. 682; Gurney *v.* Evans, 3 Hurlst. & N. 122.

16. Promissory notes executed in the firm name, to parties in the habit of dealing with the firm, are evidence of partnership. Cook *v.* Frederick, 77 Ind. 406. In such cases the burden of proof is thrown upon the other partners to show that the note was given in a matter not relating to the partnership business, and that with the knowledge of the payee. Whitaker *v.*

Drafts of agreements which have been acted upon. (*e*)

Letters and memoranda showing an intention to give a person a share of profits, coupled with evidence that such intention was acted on. (*f*)

*90] *Meetings.* Attending and taking part in them; (*g*) requiring them to be called. (*h*)

Payment of money into court. When in an action against two persons, as partners, they pay money into court, this does not amount to an admission of the partnership alleged to exist between them, but only of a joint liability to the extent of the amount paid in. (*i*)

Recitals in agreements. (*k*)

Registers. These do not affect a person whose name is in them unless he can be proved to have authorized the use of his name, (*l*) or unless there is some statute applicable to the case. An entry in custom-house books made by one of three alleged partners, to the effect that he and the other two were jointly interested in certain goods, though conclusive as between them and the crown, is not so as between them and other persons. (*m*)

Release executed by all the alleged partners. (*n*)

Verdict. A verdict of a jury finding the existence of a partnership upon the trial of an issue directed out of chancery, was held by Lord Kenyon conclusive evidence against the partners in a subsequent action brought against them by a creditor. (*o*)

Use of property by several jointly. (*p*)

Witness. A witness may be asked not only who compose such and such a firm, but also whether named individuals do so. (*q*) To prove a partnership between A, in England, and B, in Spain, it has been held not enough to show that A once dwelt in a town in Spain, and that B resides and carries on business there under the name of A, B & Co., and that there is no one there of the name of A. (*r*)

Brown, 16 Wend. (N. Y.) 505. But the mere fact that two persons sign a note jointly is no evidence of a partnership between them. Hopkins *v.* Smith, 11 Johns. (N. Y.) 161.

(*e*) Worts *v.* Pern, 3 Bro. P. C. 558.

(*f*) Heyhoe *v.* Burge, 9 C. B. 431; Baxter *v.* West, 1 Drew. & S. 173, where a partnership for seven years was proved by an unsigned memorandum on which the parties had acted.

(*g*) Lake *v.* Argyll, 6 Q. B. 477, and Wood *v.* Argyll, 6 Man. & G. 928; noticed *ante* p. *44. See, also, Peel *v.* Thomas, 15 C. B. 714.

(*h*) Tredwen *v.* Bourne, 6 Mees. & W. 461.

(*i*) Charles *v.* Branker, 12 Mees. & W. 743.

(*k*) Leiden *v.* Lawrence, 2 N. R. 283.

(*l*) Fox *v.* Clifton, 6 Bing. 776. As to joint stock companies, see the volume on that subject.

(*m*) Ellis *v.* Watson, 2 Stark. 453.

(*n*) Gibbons *v.* Wilcox, 2 Stark. 43.

(*o*) Whately *v.* Menheim, 2 Esp. 608. *Qu.* if this can be supported? See Coll. on Part. 532, quoting Mr. Starkie's comments on the case.

(*p*) Weaver *v.* Prentice, 1 Esp. 369. See, as to co-owners who are not partners, *ante* pp. *58, *et seq.*

(*q*) Acerro *v.* Petroni, 1 Stark. 100.

(*r*) Burgue *v.* De Tastet, 3 Stark. 53.

*CHAPTER V. [*91

OF ILLEGAL PARTNERSHIPS.

SECTION I.—WHAT PARTNERSHIPS ARE ILLEGAL, *91.
SECTION II.—CONSEQUENCES OF ILLEGALITY, *102.

Illegal partnerships.—In order that a partnership may result from a contract, such contract must not be illegal. This gives rise to two questions which it is proposed to discuss in this chapter, viz.:

1. What partnerships are illegal.
2. What are the consequences of their being so.

SECTION I.—WHAT PARTNERSHIPS ARE ILLEGAL.

Illegality never presumed.—Illegality is never presumed, but must always be proved by those who assert its existence; and, in order to show that a partnership is illegal, it is necessary to establish either that the object of the partnership is one the attainment of which is contrary to law, or that, the object being legal, its attainment is sought in a manner which the law forbids. But proof that a firm has been guilty of an illegal act is not sufficient to bring the firm within the class of illegal partnerships; for if this were enough, every partnership which does not pay its debts, or which commits any tort, or is guilty of culpable negligence, would be illegal, which is obviously absurd. (*a*) Neither does it, by any means, follow that because one or more clauses in a contract of partnership are illegal the partnership is itself illegal. (*b*) [1]

(*a*) See Armstrong *v.* Armstrong, 3 Myl. & K. 64, 65; Sharp *v.* Taylor, 2 Ph. 818; Brett *v.* Beckwith, 3 Jur. (N. S.) 31, M. R; Longworth's Executor's Case, 1 De G., F. & J. 17. See the judgment of Lord Campbell.

(*b*) See R. *v.* Stainer, L. R., 1 Cr. Cas. Res. 230; General Co. of Land Credit, 5 Ch. 363.

1. **Validity of the contract, generally.**—There is nothing in the nature or essence of a partnership which confines it

*92] *Grounds of illegality. Public policy.*—1. A partnership may be illegal upon the general ground that it is formed for a purpose forbidden by the current notions of morality, religion or public policy. A partnership, for example, formed for the purpose of deriving profits from the sale of obscene prints, or of books reviling or ridiculing the established religion, or for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal. (*c*) In the time of Charles II., it seems to have been held that a contract for sharing the profits derived from the public exhibition of a human monster was illegal; (*d*) but the writer is not aware of any modern case to the same effect, and the decision alluded to would not probably now be followed upon grounds of public policy. [2]

to ordinary trade and commerce or to dealings in personal property. It may exist between attorneys, conveyancers, mechanics, owners of stage-coaches, artisans, or farmers, as well as between merchants and bankers, and also between dealers and speculators in real estate, without becoming void by operation of the statute of frauds. Chester *v.* Dickinson, 45 How. (N. Y.) Pr. 325.

Partners may modify, alter or dissolve their contract, as between themselves, either in whole or in part, provided they do not violate any principle of law or public policy. Solomon *v.* Solomon, 2 Ga. 18.

The contract between them may be usurious, and yet make them liable as partners to third persons. Pierson *v.* Steinmyer, 4 Rich. (S. C.) 309.

(*c*) See the title, "Illegal Contracts," in Chitty's and Pollock's treatises on the "Law of Contracts;" and, as to the sale of offices, Sterry *v.* Clifton, 9 C. B. 110; and, as to associations for promulgating irreligious opinions, see Pare *v.* Clegg, 29 Beav. 589; Thornton *v.* Howe, 8 Jur. (N. S.) 663.

(*d*) See Herring *v.* Walround, 2 Ch. Cas. 110. The thing exhibited was a pair of female children, having "two heads, four arms, four legs, and but one belly, where their two bodies were conjoined."

2. **Partnership contracts opposed to public policy.**—A partnership cannot be lawfully formed to carry on an illegal or fraudulent scheme. Sampson *v.* Shaw, 101 Mass. 145; Dunham *v.* Presby, 120 Id. 285.

Thus, in Louisiana it is held that partners in a lease of the penitentiary can make no contract for the use or hire of the negro convicts, except in the employments required by law. Any contract, express or implied, for any other use is against public policy and cannot be enforced. Pratt *v.* McHatton, 11 La. Ann. 260. And in New York a city ordinance providing that every proposal for municipal work should contain the names of all persons interested, prohibiting any secret agreement or understanding that one not named should become interested in any contract, it was held that a secret partnership between two persons that they were to be equally interested in the contract for work obtained by one of them, was illegal, being against public policy and contrary to positive law. Kelly *v.* Devlin, 58 How. (N. Y.) Pr. 487.

The following partnership agreements have been held not to be void as contrary to public policy: A combination between several persons engaged in furnishing recruits to the army not to furnish them for less than so much, without the consent of all, and

War.—Whilst two countries are at war it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other. A partnership, therefore, formed between persons resident in this country for the purpose of trading with an enemy's country is illegal; and *a fortiori* is such a partnership illegal if one of the members of it is resident in that country, and is, therefore, an alien enemy. (*e*) But a partnership in this country for running a blockade established by one belligerent nation in the ports of another is not illegal; for, subject to the risk of capture, a neutral may lawfully trade with a belligerent. (*f*) [3]

Trading under an assumed name.—In this country a person may legally carry on business under a name not his own; and when a firm has an established reputation, and one of its members dies, it is not deemed wrong for the survivors to continue the business under the old name, although, perhaps, the reputation of the firm may have been due mainly, if not entirely, to the ability and integrity of *the [*93 deceased partner. The legal view of such conduct is in accordance with established usage, and it has been accordingly held not to be illegal for surviving partners to continue to carry on business under the old name. (*g*) [4]

to share all profits and losses equally. Marsh *v.* Russell, 66 N. Y. 288; reversing 2 Lans. 340.

An agreement between two partners that all earnings, perquisites and salaries received by either of them as a public officer shall be immediately turned in to the funds of the firm as firm property. Thurston *v.* Fairman, 9 Hun (N. Y.) 584.

(*e*) See Evans *v.* Richardson, 3 Mer. 469.

(*f*) Ex parte Chavasse, 4 De G., J. & S. 655; The Helen, L. R. 1 Ad. & Ecc. 1.

3. Effect of war. — A partnership formed for the purpose of running the blockade of the insurrectionary states during the civil war in the United States was held not to be illegal. Wallis *v.* Wheelock, 26 La. Ann. 246. See, also, Leftwich *v.* Clinton, 4 Lans. (N. Y.) 167; De Leon *v.* Trevino, 49 Tex. 89; and U. S. Dig., tit. "War."

(*g*) See Bunn *v.* Guy, 4 East 190; Aubin *v.* Holt, 2 Kay & J. 66; Lewis *v.* Langdon, 7 Sim. 421; and compare Thornbury *v.* Bevill, 1 You. & C. Ch. 554.

4. Survivor continuing use of firm name.—A entered into a partnership with B, dissolved it, formed with C a partnership under the name of "A & Co.," and died. His administrator conveyed to B the right to use A's name in his business. *Held*, that the administrator and B might join in a bill in equity, under Mass. Gen. Stat., ch. 56, § 3, to restrain C from continuing to do business under the name of A & Co. Morse *v.* Hall, 109 Mass. 409. See, also, Bowman *v.* Floyd, 3 Allen (Mass.) 76, where the same court held that a receipt given by executors for money due and paid to the estate of their testator, from his former partners, in which the latter are mentioned by the name of the former partnership under which they continued to carry on business, will not be construed as a written consent to the continued use

Speaking generally, and excluding cases specially provided for by statute, (*h*) a partnership is not illegal simply because it carries on business under a name which does not disclose its members, *e. g.*, under such a name as "The City Investment and Advance Company." (*i*) It is indeed said that it is illegal at common law for persons not incorporated to assume to act as if they were, and that to trade under such a name as the above is assuming to act as a corporation; but even if assuming to act as a corporation is an offence at common law, which is very doubtful, (*k*) the offence is not committed by trading under a name which is by usage as applicable to an unincorporated as to an incorporated body. (*l*) [5]

of the former partner's name in the new business and firm, if it was executed and delivered merely for the purpose of exhibiting the settlement of the claim.

As to the rights of the successors in business of a dissolved partnership to the use of the old firm name, trade-marks and labels, under the New York decisions, see Hazard *v.* Caswell, 46 N. Y. Super. Ct. 559; S. C., 57 How. Pr. 1; Lunt *v.* Lunt, 8 Abb. (N. Y.) N. Cas. 76; Lane *v.* Arnold, 13 Id. 73; S. C., 11 Daly 293; reversing 63 How. Pr. 40; Amstaedt *v.* Blumenfeld, N. Y. Dail. Reg., June 17th, 1884.

(*h*) See, as to pawnbrokers, *infra*.

(*i*) See Maughan *v.* Sharpe, 17 C. B. (N. S.) 443; Garrard *v.* Hardey, 5 Man. & G. 471; Ex parte Grisewood, 4 De G. & J. 544.

(*k*) See 6 Man. & G. 107, and the volume on Companies.

(*l*) See the cases in the last note but one. An unincorporated society was held to have no right to be provisionally registered under 7 and 8 Vict., c. 110, under a name which necessarily denoted a corporation, *e. g.*, the Sea, Fire, &c., Insurance Corporation. R. *v.* Whitemarsh, 14 Q. B 803.

5. **Using false or fictitious firm name.**—The provisions of the New York act of 1833 (Laws of 1833, ch. 281) in reference to transacting business under fictitious names, which prohibits a person from transacting business in the name of a partner not interested in the business, and which requires that where "& Co." is used it shall represent an actual partner, does not apply to or include the use of the real name of an actual partner, although such a partner is under a disability at the time. Zimmerman *v.* Erhard, 83 N. Y. 74; S. C, 60 How. Pr. 163. Where, therefore, a firm is composed of a husband and wife, the latter being represented by the "& Co." in the firm name, in the absence of any intention to impose upon the public by obtaining undue credit, and conceding that a married woman cannot be a partner of her husband, this is not a violation of the statute. Ib.

That statute, being highly penal, must be strictly construed; its violation by the plaintiff in an action against carriers for loss of goods shipped by him in the name of a dissolved firm, is not a good defence. Wood *v.* Erie Ry. Co., 72 N. Y. 196; S. C., 28 Am. Rep. 125; affirming 9 Hun 648.

But it has been held under this statute that an action cannot be sustained on a contract which was made by plaintiff while transacting business under the firm name, including the words "& Co.," when the addition of "& Co." did not represent an actual partner (Swords *v.* Owen, 43 How.

2. *Profits of crime.*—A partnership is illegal if formed for the purpose of deriving profit from a criminal offence, *e. g.*, from smuggling, robbery, theft, &c. (*m*) A curious instance of partnership between two highwaymen is said to have come before the courts in the last century, and to have been referred to by Lord Kenyon. As the case is not to be found in the reports, an abridged note of it is given below; (*n*) but

(N. Y.) Pr. 176); and that a *quasi* partner, *i. e.*, one who is liable to third persons as a partner, is a partner within the meaning of the above statute. Greenwood *v.* Brink, 1 Hun (N. Y.) 227; S. C., 3 Thomp. & C. 740.

Again, it has been held, under this same statutory provision, that the fact that plaintiff, in an action for violation of a contract made in another state to be performed here, was doing business in such other state under a fictitious partnership name, is no defence to the action. Stoddart *v.* Key, 62 How. (N. Y.) Pr. 137. See, also, Ross *v.* Wigg, 34 Hun (N. Y.) 192, and Ellison *v.* Smoller, 1 City Ct. (N. Y.) Rep. 484, in which last-cited case a local court holds a contrary doctrine.

The *bona fide* holder of a note endorsed by the payee under a false firm name, may recover on such note against both maker and endorser (distinguishing O'Toole *v.* Garvin, *supra*). Bull's Head Bank *v.* McFeeters, 41 N. Y. Super. Ct. 215. See, also, Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1.

Again, violation of the statute constitutes no defence to an action by the firm on a fidelity bond given by an employee, in which the individual names of the partners are given as well as the fictitious firm name. Gay *v.* Seibold, 97 N. Y. 472.

But a violation of the statute is a good defence to an action for the price of goods sold by plaintiff under a false partnership name. O'Toole *v.* Garvin, 1 Hun (N. Y.) 92; S. C., 3 Thomp. & C. 118.

The statute has no application to the use of the term "Alderney Manufacturing Company." Lafferty *v.* Wheeler, 11 Daly (N. Y.) 194.

In Louisiana it is held that the statute of that state (Rev. Stat., §§ 2668, 2669), preventing the use of the name of a person not interested in the firm, is designed to prohibit the obtaining of credit, but not the giving of it. Kent *v.* Majoiner, 36 La. Ann 259.

In California the failure to allege compliance with Civil Code, §§ 2466, 2468, requiring certain partnerships to file a certificate giving the names of the partners, under penalty of legal incapacity to sue, will not make a complaint by such partnership demurrable; non-compliance with the law is matter of defence. Phillips *v.* Goldtree, 13 Pac. Rep. 313.

(*m*) See Biggs *v.* Lawrence, 3 T. R. 454, and Stewart *v.* Gibson, 7 Cl. & F. 707, as to smuggling. The last case is instructive on account of the care taken to conceal the true nature of the illegal transactions.

(*n*) Everet *v.* Williams (2 Pothier on Obligations, by Evans, p. 3, note citing Europ. Mag., 1787, vol. 2, p. 360) is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets and fairs; that the plaintiff and the de-

*94] there *is some doubt whether it actually occurred. Real or fictitious, it is a good illustration of an illegal partnership of the class in question. (*o*)

3. *Partnerships illegal by special statutes.*—A partnership is also illegal if formed for a purpose forbidden by statute, although independently of the statute there would be no illegality. At one time a distinction was taken between *mala prohibita* and *mala in se*, but this distinction has very properly long ceased to be recognized as of any value for legal purposes. What judicial tribunals have to regard is the law they are called on to administer, and what is forbidden by that law is illegal, whether it is also forbidden by the laws of morality and religion or not. (*p*) [6]

Observations on such acts.—Whether a partnership is illegal by virtue of any particular statute obviously depends upon the construction of the statute in question. With reference, however, to those statutes which prohibit unqualified persons from carrying on certain trades *or businesses, it may be observed that such statutes are not infringed by an unqualified person who does nothing [*95

fendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane and other things to dispose of which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, &c.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz.: at Bagshot, Salisbury, Hampstead and elsewhere, to the amount of £2000 and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed, with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 apiece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported. See 20 Eq. 230, note.

(*o*) The case was referred to by Jessel, M. R., in 11 Ch. D. 195.

(*p*) See Aubert *v.* Maze, 2 Bos. & P. 371.

6. In New Jersey, under a statute declaring that no one should prosecute his suit except by himself or by a *licensed attorney-at-law*, it was held that one could not prosecute by two or more attorneys in partnership, since they could not bring themselves within the description of *one licensed attorney-at-law*. Wilson *v.* Wilson, 2 Halst. (N. J.) 791.

more than share the profits arising from those trades or businesses, if they are in fact carried on by persons who are duly qualified. The unqualified person is not within the mischief of the statutes in question, and the partnership of which he is a member is not therefore illegal. (*q*)

Prohibitory and penal acts.—Again, although a statute may in terms apparently prohibit an act or omission, and affix a penalty in case of disobedience, it does not necessarily follow that all transactions to which the penalty attaches are illegal. They are so if the statute is really prohibitory, (*r*) but they are not so if the true construction of the statute is that the penalty is, as it were, the price of a license for doing what the statute apparently forbids. (*s*) Therefore it was held, in Brown *v.* Duncan, (*t*) that a firm of distillers was not illegal, although one of the firm carried on business as a retail dealer in spirits within two miles of the distillery (contrary to 4 Geo. IV., c. 94, §§ 132, 133), and was not registered as one of the firm in the excise books (as required by 6 Geo. IV., c. 81, § 7). It may, however, be doubted whether the statutes in question were properly construed by the court. (*u*)

The most important instances of partnerships rendered illegal by statute are as follows: (*x*)

Attorneys and solicitors.—See *infra*, "*Solicitors.*"

Bankers.—By 7 and 8 Vict., c. 32, § 21, (*y*) all bankers are required, on the 1st day of January, in every year, to make a return to the stamp office of their names, residences and occupations, or in the case of a company or partnership, of the name, residence and occupation

*96] of every member of the *company or partnership, and in default a penalty of £50 is inflicted. Upon this act a question

(*q*) See Raynard *v.* Chase, 1 Burr. 2, and *infra*, under the heads of "Medical Practitioners," "Solicitors."

(*r*) Melliss *v.* Shirley Local Board, 16 Q. B. D. 446; Cope *v.* Rowlands, 2 Mees. & W. 149; Bartlett *v.* Vinor, Carth. 252; Taylor *v.* The Crowland Gas and Coke Co., 10 Ex. 293.

(*s*) Smith *v.* Mawhood, 14 Mees. & W. 452; Swan *v.* The Bank of Scotland, 2 Mont. & A. 661; Johnson *v.* Hudson, 11 East 180.

(*t*) 10 Barn. & C. 93, and see Smith *v.* Mawhood, 14 Mees. & W. 452.

(*u*) See "Pawnbrokers," *infra*.

(*x*) For a list of trades, &c., regulated by statute, see Pollock on Contracts (4th ed.), Appendix F, note.

(*y*) Sections 8 and 29 of this act and parts of sections 9 and 23 are repealed by 37 and 38 Vict., c. 96.

might arise as to the legality of a banking partnership, or company, composed in part of members whose names are not returned.

By two statutes, which have since been considerably modified, it was made unlawful for banking firms of more than six members to issue in London, or within sixty-five miles thereof, notes payable on demand or within six months after date. (*z*)

Upon these statutes it was held that a banking company of more than six persons, associated for the purpose of issuing notes payable on demand or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London. (*a*) Upon a similar statute relating to Ireland (*b*) it was held that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business *within that limit for the whole time alleged. (*c*) The statutes in question, moreover, have been held only to affect partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business. [*97

(*z*) 39 and 40 Geo. III., c. 28, § 15; 7 Geo. IV., c. 46. See further, as to the issue of notes, 9 Geo. IV, c. 23; 3 and 4 Wm. IV., c. 83, and c. 98; 7 and 8 Vict., c. 32; Attorney-General *v.* Birkbeck, 12 Q. B. D. 605; Broughton *v.* Manchester and Salford Waterworks Co., 3 B. & A. 1; Bank of England *v.* Anderson, 3 Bing. N. C. 589; Bank of England *v.* Booth, 2 Keen 466; and on appeal, Booth *v.* Bank of England, 6 Bing. N. C. 415; and 7 Cl. & F. 509. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by bankers who were lawfully issuing them before May, 1844, under a license; but by no other bankers; and not, therefore, by any banking firm of more than six persons carrying on the business of bankers within sixty-five miles of London. In other words, there are three limits: (1) London and three miles round, in which the Bank of England has an exclusive monopoly. (2) The district more than three but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3) The district more than sixty-five miles from London, in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844.

(*a*) Ransford *v.* Copeland, 6 Ad. & E. 482.

(*b*) 6 Geo. IV, c. 42, § 10.

(*c*) Hughes *v.* Thorpe, 5 Mees. & W. 656.

Brokers.—The statutes imposing penalties upon brokers, who acted as such in the city of London without being duly admitted so to do by the mayor and aldermen, have been repealed by 47 Vict., c. 3. Although unqualified brokers could not recover their commission, (*d*) yet they could recover from their principals money paid for them by their directions or in conformity with the usages of the share market. (*e*)

Liability to penalties under the repealed statutes did not protect a broker from answering interrogatories relating to his dealings and transactions if he was sued in respect of them by his principal. (*f*)

Marine insurers.—By a statute now repealed it was made lawful for any society or partnership (except the two corporations mentioned in the act) to carry on the business of maritime insurance, or to lend money on bottomry. (*g*) This enactment gave rise to numerous decisions, which are frequently referred to as illustrating the consequences resulting from an illegal contract of partnership; and they will be noticed hereafter when those consequences are examined. In the present place, however, it is not necessary to do more than collect them in a note for facility of reference. (*h*)

The Marine Policy Stamp act, 30 Vict., c. 23, prevents marine in-
*98] surances being effected otherwise than by written policies *duly stamped. (*i*) Consequently, if the members of a mutual insurance company insure each other's ships without any policies, the insured has no remedy against the insurers in case of a loss. (*k*)

Medical practitioners.—By 55 Geo. III., c. 194, § 14, unqualified medical men are prohibited from practicing; and by the Medical act,

(*d*) Cope *v.* Rowlands, 2 Mees. & W. 149.

(*e*) Smith *v.* Lindo, 4 C. B. (N. S.) 395, and 5 Id. 587; Pidgeon *v.* Burslem, 3 Ex. 465; Jessopp *v.* Lutwyche, 10 Ex. 614.

(*f*) Green *v.* Weaver, 1 Sm. 404; Robinson *v.* Kitchin, 8 De G., M. & G. 88, and 21 Beav. 365.

(*g*) 6 Geo. I., c. 18, repealed by 5 Geo. IV., c. 114, § 1, as to insurances.

(*h*) The following are the decisions on the above enactment: Mitchell *v.* Cockburn, 2 H. Bl. 379; Booth *v.* Hodgson, 6 T. R. 405; Lees *v.* Smith, 7 Id. 338; Harrison *v.* Millar, Id. 340, note; Everth *v.* Blackburne, 2 Stark. 66; Ex parte Bell, 1 M. & S. 751; Aubert *v.* Maze, 2 Bos. & P. 371; Watts *v.* Brooks, 3 Ves. 612; Knowles *v.* Haughton, 11 Id. 168.

(*i*) They can now be stamped after their execution on payment of a penalty (39 Vict., c. 6, § 2); but a written policy is still necessary.

(*k*) See Edwards *v.* Aberayron Mutual Soc., 1 Q. B. D. 563; Ex parte Hargrove, 10 Ch. 542; Fisher *v.* Liverpool Marine Insur. Co., L. R., 9 Q. B. 418; Smith's Case, 4 Ch. 611; Brett *v.* Beckwith, 3 Jur. (N. S.) 31; Bromley *v.* Williams, 32 Beav. 177. With these cases compare Martin's Case, 14 Eq. 148.

1858, (*l*) it is enacted (section 32) that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under the act. By the same act (section 40) penalties are inflicted on all persons who willfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition or description implying that he is registered under the act, or is recognized by law as a physician, &c.

Upon the above acts it has been decided that agreements contrary to 55 Geo. III. are illegal and cannot be enforced, (*m*) but that a medical practitioner may maintain an action for attendances, &c., although not registered when they took place, it being sufficient that he should be registered at the time of trial; (*n*) and there is nothing illegal in one member of a firm being registered in one character and another in another; nor in their respectively attending to their appropriate branches of the profession; nor in their jointly suing in respect of the services rendered by each in his own branch. (*o*) It has also *been intimated by high authority that if only one member of a firm [*99 is duly registered, the requisitions of the statute are complied with; (*p*) but the unregistered partner cannot lawfully act as a physician, surgeon or apothecary. (*q*)

Newspaper proprietors.—By 44 and 45 Vict., c. 60, § 8, the titles of newspapers and the names, occupations and residences of their proprietors are required to be registered with the registrar of joint stock companies, and penalties are payable on default.

Patentees.—Prior to 1852 a patent for an invention contained a pro-

(*l*) 21 and 22 Vict., c. 90. As to chemists and druggists, see 31 and 32 Vict., c. 121, and Pharmaceutical Soc. *v.* Lon. Supply Assoc., 5 App. Cas. 857.

(*m*) Davies *v.* Makuna, 29 Ch. D. 596.

(*n*) Turner *v.* Reynall, 14 C. B. (N. S.) 328.

(*o*) Ib.

(*p*) Per Erle, C. J., Ib. Compare the cases in the next note. See, further, De la Rosa *v.* Prieto, 16 C. B. (N. S.) 578; and as to pretending to be a legally qualified practitioner, see Pedgrift *v.* Chevallier, 8 C. B. (N. S.) 240 and 246; Ellis *v.* Kelly, 6 Hurlst. & N. 222. The cases decided upon the Apothecaries acts, 55 Geo. III., c 104, and 6 Geo. IV., c. 133, will be found in 1 Chitty's Statutes.

(*q*) Howarth *v.* Brearley, 19 Q. B. D. 303; Davies *v.* Makuna, 29 Ch. D. 596; Pharmaceutical Soc. *v.* Lon. Supply Assoc., 5 App. Cas. 857.

viso to the effect that the patent should be void if more than twelve persons became interested in it as partners. (*r*) But now there is no limit placed upon the number of persons who may be interested in a patented invention.

Pawnbrokers.—By 35 and 36 Vict., c. 93, § 13, every pawnbroker is required to have his name legibly printed over the door of every shop or place where he carries on his business. Under the previous act, 39 and 40 Geo. III., c. 98, an agreement to carry on a pawnbroking business in partnership was illegal if it was part of the agreement that the names of some of the partners should be concealed, or, in other words, if it was part of the agreement that some of the partners should be dormant. (*s*) Whether these decisions apply to the present act is open to some doubt (see section 51), but they probably do. It is conceived, however, that pawnbroking may be legally carried on by a registered company if the name of the company is properly painted up.

*100] *Solicitors.*—By several statutes, it has long been unlawful for any person, not duly qualified, to act by himself or another as a solicitor, or to suffer his name to be made use of upon the account or for the profit of an unqualified person. (*t*) Upon these statutes questions have arisen as to how far it is lawful for a qualified solicitor to share the profits of his business with a person who is not qualified, and it has been held that there is no illegality in this where the non-qualified person does not share the profits in consideration of his acting in any manner as a solicitor. (*u*) For example, there is nothing illegal in an agreement that a surviving partner of a firm of solicitors shall share his profits with the widow of a late partner. (*x*)

But an agreement for a partnership, in the ordinary sense of the

(*r*) Hindmarch on Patents 66. See Duvergier *v.* Fellowes, 5 Bing. 248, and on appeal, 10 Barn. & C. 826, and 1 Cl. & F. 39.

(*s*) See Lewis *v.* Armstrong, 3 Myl. & K. 53; Armstrong *v.* Lewis, 2 Cromp. & M. 274; Gordon *v.* Howden, 12 Cl. & F. 237; Fraser *v.* Hill, 1 M'Queen 392. Compare Brown *v.* Duncan, 10 Barn. & C. 93, where one of a firm of distillers was not licensed as required by the excise laws.

(*t*) See 6 and 7 Vict., c. 73, §§ 2, 26, 32; 23 and 24 Vict., c. 127, § 26, and 37 and 38 Vict., c. 68, § 12. See, as to partnerships between town clerks and other solicitors, Hughes *v.* Statham, 4 Barn. & C. 187; and as to prosecutions by partners of clerks of the peace, see 5 and 6 Wm. IV., c. 76, § 102, and R. *v.* Fox, 1 El. & E. 729.

(*u*) Scott *v.* Miller, Johns. 220, is a strong case on this head.

(*x*) Chandler *v.* Chandler, Jac. 225, and 6 Madd. 141; Sterry *v.* Clifton, 9 C. B. 110; and see Aubin *v.* Holt, 2 Kay & J. 66. See, also, *supra*, "Medical Practitioners."

word, between a person duly qualified and one who is not, is clearly illegal,(*y*) and if the agreement is in writing and is for a present partnership, parol evidence cannot be admitted to show that it was not to take effect until both parties were qualified. (*z*) But an agreement between a solicitor and his articled clerk that the latter, when a solicitor, shall become a partner with the former and share his profits retrospectively, is not illegal.(*a*) However, the statutes cannot be evaded by an agreement to the effect that the unqualified person shall receive a share of the profits as a salary, and that he shall not be a partner with the other.(*b*) Nor can a solicitor's clerk, unless himself qualified, act as a solicitor under cover of his *principal's name.(*c*) It was, however, held that a person who had been [*101 duly examined, sworn and admitted, but who had not taken out his annual certificate, was not unqualified within the meaning of the act of Geo. II.;(*d*) and since the act 6 and 7 Vict., c. 46, it has been held not unlawful for a qualified solicitor to act, upon the usual agency terms, as the solicitor of another solicitor who has not taken out his certificate.(*e*)

It is illegal for two persons, one qualified and the other unqualified, to hold themselves out as partners, and to put both their names to bills of costs and other documents in which their names ought not to appear, unless they are qualified solicitors.(*f*)

Theatrical representations.—By several statutes, now repealed,(*g*) it was unlawful to act any play for gain except under certain restrictions. Partnerships, therefore, for sharing profits to be derived from acting plays otherwise than in accordance with these acts were illegal.(*h*)

Unincorporated joint stock companies with transferable shares.—The question whether unincorporated companies with transferable shares were illegal at common law or under the Bubble act of 1719 (6 Geo.

(*y*) Williams *v.* Jones, 5 Barn. & C. 108. See Scott *v.* Miller, Johns. 220.

(*z*) Williams *v.* Jones, 5 Barn. & C. 108.

(*a*) Ex parte Joyce, 4 Ch. D. 596.

(*b*) Tench *v.* Roberts, 6 Madd. 145; Re Jackson, 1 Barn. & C. 270; see, too, Re Clark, 3 Dowl. & R. 260; Hopkinson *v.* Smith, 1 Bing. 13. *Quære* the effect on these cases of the act 28 and 29 Vict., c. 86, *ante* pp. *35, *et seq.*

(*c*) Hopkinson *v.* Smith, 1 Bing. 13; Re Palmer, 2 Ad. & E. 686.

(*d*) Re Hodgson, 3 Ad. & E. 224; and see Hodgkinson *v.* Mayer, 6 Ad. & E. 194.

(*e*) Ex parte Foley, 11 Beav. 456.

(*f*) Edmonson *v.* Davis, 4 Esp. 14.

(*g*) 10 Geo. II., c. 28; 25 Id., c. 36 (made perpetual by 28 Id., c. 19); and 28 Geo. III., c. 30; repealed by 6 and 7 Vict., c. 68. As to what is a theatre within this act, see Davys *v.* Douglas, 4 Hurlst. & N. 180.

(*h*) Ewing *v.* Osbaldiston, 2 Myl. & C. 53; De Begnis *v.* Armistead, 10 Bing. 107.

I., c. 18), will be found discussed in the volume on Companies. The question has now only a historical interest.

Unregistered partnerships, &c.—By the Companies act, 1862, § 4, all banking partnerships of more than ten members, and all other partnerships of more than twenty members, formed after the 2d of November, 1862, (*i*) must be registered under that act, unless formed in pursuance of some special act, charter or letters patent, or for working mines in the stannaries; and any partnership required to be registered, and *not registered, is illegal. (*k*) This subject will be found more fully examined in the volume on Companies.

*102]

SECTION II.—CONSEQUENCES OF ILLEGALITY.

Consequences of illegality.—If a partnership when it is formed will be illegal, any contract to form it must be illegal also. Upon this ground it was held, in Duvergier *v.* Fellowes, (*l*) that a bond for the payment of money upon the formation, by the obligee, of an illegal company was invalid; and in Williams *v.* Jones, (*m*) that no action lay for the recovery of a premium agreed to be paid by the defendant on being taken into partnership with the plaintiff, and which partnership was illegal.

Enforcing agreement.—An agreement for an illegal partnership will not be enforced even if it has been partly performed. Ewing *v.* Osbaldiston (*n*) is a good instance of this. There the plaintiff and the defendant agreed to become partners in a theatre. The plaintiff advanced part of the money, and the defendant applied it in part payment for a lease of the theatre. The lease was afterwards assigned to him alone. The defendant did not perform his part of the agreement,

(*i*) See, as to this, Shaw *v.* Simmons, 12 Q. B. D. 117; and, as to what associations need not be registered, Smith *v.* Anderson, 15 Ch. D. 247.

(*k*) Jennings *v.* Hammond, 9 Q. B. D. 225; Shaw *v.* Benson, 11 Id. 563; Ex parte Poppleton, 14 Q. B. D. 379; Padstow Total Loss Assoc., 20 Ch. D. 137. Sykes *v.* Beadon, 11 Ch. D. 170, although overruled by Smith *v.* Anderson, 15 Ch. D. 247, on the necessity of registration, would have been rightly decided if the association had required registration.

(*l*) 5 Bing. 248; 10 Barn. & C. 826; and 1 Cl. & F. 39.

(*m*) 5 Barn. & C. 108.

(*n*) 2 Myl. & C. 53.

and the plaintiff accordingly filed a bill against him. The bill prayed that it might be declared that the plaintiff and the defendant were partners in the theatre and in the lease thereof, and that the agreement made between the plaintiff and the defendant might be performed, and, if necessary, that the partnership might be dissolved and the usual accounts taken. The agreement, however, was illegal by 10 Geo. II., c. 28, and the bill was dismissed. It was decided, on appeal, that the agreement being illegal, it was impossible for the court to decree its specific performance, and that if the plaintiff sought to recover back *the money he had paid, he could not do so in that suit as (even [*103 if he had a lien on the property for the money which the court denied) the bill did not seek to enforce such lien.

Actions by an illegal partnership.—If a partnership is illegal, its members cannot maintain any action in respect of any transaction tainted with illegality. For example, if a partnership is formed for selling smuggled goods, it cannot recover the price of any smuggled goods which it may have sold. (*o*) So, an illegal loan society cannot recover money it has lent. (*p*) But an illegal partnership can prosecute a person stealing its property. (*q*)[7]

Actions against an illegal partnership.—The illegality of a partnership affords no reason why it should not be sued. It cannot, indeed, be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm, (*r*) but the illegality of the firm does not *per se* afford any answer to a demand against it arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*, and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership. (*s*)

(*o*) See Biggs *v.* Lawrence, 3 T. R. 454.

(*p*) Shaw *v.* Benson, 11 Q. B. D. 563; Jennings *v.* Hammond, 9 Id. 225.

(*q*) See R. *v.* Frankland, Leigh & C. 276; 9 Jur. (N. S.) 388; 32 L. J. M. C. 69.

7. Where persons enter into a copartnership with the fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, such persons cannot maintain an action of trespass, *quare clausum fregit*, jointly against a person who forcibly enters the storehouse and seizes the goods. McPherson *v.* Pemberton, 1 Jones (N. C.) L. 378.

(*r*) Re South Wales Atlantic Steamship Co., 2 Ch. D. 763.

(*s*) See the judgment of Mellish, L. J.,

So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and fraudulent representations, still the fraud so perpetrated affords no answer to a creditor of the firm, (*t*) unless that creditor has himself been party to the fraud. (*u*) Moreover, where a company has been established by fraud and where it has been engaged in illegal transactions, the innocent shareholders *are nevertheless liable amongst themselves to contribute, if necessary, to the payment of the debts of the company; for such shareholders are not so *in delicto* as to preclude any one of them from calling on the others to share the losses to which he and they are liable. (*x*)

*104]

Actions for contribution, &c.—The most important consequence, however, of illegality in a contract of partnership is that the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defence to a claim by that other, for an account and payment of his share of the profits made thereby, such a defence must be allowed to prevail in a court of justice. Were it not so, those who—*ex hypothesi*—have been guilty of a breach of the law would obtain the aid of the law in enforcing demands arising out of that very breach; and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favor to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality. (*y*) There are, indeed, some old cases in which this defence was not allowed to prevail; (*z*) but they have been long overruled. (*a*) Moreover, if

in the last case, and Brett *v.* Beckwith, 3 Jur. (N. S.) 31, M. R.

(*t*) Henderson *v.* The Royal Brit. Bank, 7 El. & B. 356.

(*u*) See Batty *v.* M'Cundie, 3 Car. & P. 203.

(*x*) See Longworth's Executor's Case, Johns. 465; affirmed 1 De G., F. & J. 17.

(*y*) See Sykes *v.* Beadon, 11 Ch. D. 170; Holman *v.* Johnson, 1 Cowp. 341; Thomson *v.* Thomson, 7 Ves. 470; Cousins *v.* Smith, 13 Ves. 544.

(*z*) Dover *v.* Opey, 2 Eq. Cas. Ab. 7; Watts *v.* Brooks, 3 Ves. 611.

(*a*) See the cases cited *infra*.

the illegality is brought to the notice of the court, it will, of its own accord, decline to interfere between the parties, although there may be no desire on their part to urge such an objection. (*b*)

Illegality a defence at law.—When partnerships of marine insurers were illegal, it was *held that if one member of a firm of such [*105 insurers paid all the losses sustained by the firm, he could not recover any part of the moneys paid from his copartners; (*c*) and that if the premiums were received by one only, the others could not obtain their shares from him. (*d*) So, where there was an express covenant to pay such shares, the covenant was held to be invalid by reason of the illegality which tainted it; (*e*) and even where an arbitrator had awarded what was to be paid by one partner to the other, it was held that the award could not be enforced. (*f*) These cases are of undoubted authority, and are always referred to as such, although the particular ground of illegality on which they rested no longer exists. It has, indeed, been held, in one or two cases of illegal partnership, that if one partner has paid losses at the special request of the other, who promised to pay his share afterwards, an action for such share may be sustained; (*g*) but these cases cannot be reconciled with others, and must be taken to be overruled. In De Begnis *v.* Armistead, (*h*) the plaintiff and the defendant entered into an illegal agreement for bringing out an opera and dividing the profits arising from it. By the agreement, the plaintiff was to pay the singers, and the defendant was to provide a theatre and pay the dancers. This was done; but, instead of profits, there were losses, and on the whole account a balance was found due to the plaintiff. A bill for the balance was given by the defendant, and it was proved that the balance was made up of different sums paid by the plaintiff at the defendant's request. It was nevertheless held that the original agreement being illegal, the plaintiff could not recover the balance in question, either on the bill or the common money counts.

Illegality a defence to an account.—Nor can an action for an account be sustained by one member of an illegal partnership against another, in respect of its dealings and transactions. (*i*) Thus, if an association is

(*b*) Evans *v.* Richardson, 3 Mer. 469.
(*c*) Mitchell *v.* Cockburn, 2 H. Bl. 380.
(*d*) Booth *v.* Hodgson, 6 T. R. 405.
(*e*) Lees *v.* Smith, 7 T. R. 338.
(*f*) Aubert *v.* Maze, 2 Bos. & P. 371.
(*g*) See Petrie *v.* Hannay, 3 T. R. 418; Faikney *v.* Reynous, 4 Burr. 2070.
(*h*) De Begnis *v.* Armistead, 10 Bing. 107. See Fisher *v.* Bridges, 3 El. & B. 642, reversing S. C., 2 Id. 118.
(*i*) Knowles *v* Haughton, 11 Ves. 168; Armstrong *v.* Armstrong, 3 Myl. & K. 45;

*106] *illegal by reason of non-registration under the Companies act, 1862, an action cannot be sustained by its members against its trustees for the execution of their trust, nor to make them responsible for losses arising from breaches of trust. (*k*) [8]

Concealed illegality.—Moreover, if it can be shown that the purpose with which a partnership was formed was illegal, the consequences of illegality will follow, however skillfully the true purpose may have been concealed; (*l*) and parol evidence may be given to show the existence of the illegality, however formally the partnership agreement may have been drawn up, and however successful the parties may have been in making that agreement legal on the face of it. (*m*)

Illegality, when not a defence.—In order, however, that illegality may be a defence, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks. It

Harvey *v.* Collett, 15 Sim. 332.

(*k*) Sykes *v.* Beadon, 11 Ch. D. 170, is an authority for this proposition, although overruled on another ground, *ante* p. *101.

8. Accounting between partners engaged in illegal business.—One partner cannot sue the other for an account of profits made in Confederate money transactions; nor can the complainant sustain such action in respect of profits realized on dealings of a lawful character if the latter are so blended with Confederate money transactions that it is impossible to so separate them as to give effect to the legal transactions alone. Zane *v.* Thomas, 37 Tex. 157.

But if, in a suit to settle the partnership, it appears that a part of a partnership business was legal and a part illegal, the court may take charge of that portion which is legal, and appoint a receiver therefor. Anderson *v.* Powell, 44 Iowa 20.

Thus, in Watson *v.* Fletcher (7 Gratt. (Va.) 1), where it appeared in evidence, but not in the pleadings, in an equity case, that the partnership, whose accounts were to be settled in the suit, was for gambling purposes, it was held that a court of equity would not lend its aid to reimburse one partner from the estate of the other for any losses suffered or debts contracted in the business of gambling, nor for the settlement of the business of the partnership.

On the other hand, in Belcher *v.* Conner (1 So. Car. 85), it was held that the fact that the partnership was for the purchase and sale of slaves will not prevent one partner from maintaining a bill in equity against his copartner for an accounting. (See, also, McGunn *v.* Hanlin, 29 Mich. 476.) And in Pfeiffer *v.* Maltby (38 Tex. 323), the fact that a firm sold some wares manufactured by them to the Confederate States was held not to defeat a suit by one of the firm for an account.

So, also, after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, a partner, in whose hands the profits are, cannot refuse to account for and divide them, on the ground of the illegal character of the original contract. Brooks *v.* Martin, 2 Wall. (U. S.) 70.

(*l*) Stewart *v.* Gibson, 7 Cl. & F. 707; Armstrong *v.* Armstrong, 3 Myl. & K. 53.

(*m*) See Collins *v.* Blantern, 2 Wils. 341, and 1 Sm. L. Cas., and the notes there.

by no means follows, from the circumstance that money has been obtained in breach of some law, that therefore whoever is in possession of such money is entitled to keep it in his own pocket.

Effect of illegality on the right to recover back subscriptions.—If money is paid by A to B to be applied by him for some illegal purpose, it is competent for A to require B to hand back the money if he, B, has not already parted with it,(*n*) and the illegal purpose has not been carried out.(*o*) Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby, they have a right to have their subscriptions returned;(*p*) and even though the moneys subscribed have been laid out in the purchase of land *and other things for the purpose of the company, the subscribers [*107 are entitled to have that land and those things reconverted into money, and to have it applied, as far as it will go, in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented.(*q*)

Again, Tenant *v.* Elliott,(*r*) and other cases, decided that if A and B are parties to an illegal contract, and B, in pursuance thereof, pays money to C for A's use, A can recover this money from C. It follows from this that if two partners, A and B, enter into an illegal agreement with C, and, in pursuance of this agreement, C pays money to D for the use of A and B, not only can A and B recover this money from D, but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C, instead of paying the money to D, pays it over at once to A or B. In other words, it follows from Tenant *v.* Elliott and that class of cases that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the

(*n*) See Taylor *v.* Lendy, 9 East 49; Varney *v.* Hickman, 5 C. B. 271; Diggle *v.* Higgs, L. R., 2 Ex. D. 422; Hampden *v.* Walsh, 1 Q. B. D. 189; Taylor *v.* Bowers, Id. 291.

(*o*) See Herman *v.* Jeuchner, 15 Q. B. D. 561.

(*p*) See Harvey *v.* Collett, 15 Sim. 332. Compare the cases in the next note.

(*q*) Sheppard *v.* Oxenford, 1 Kay & J. 491; Butt *v.* Monteaux, Id. 98. See, also, Symes *v.* Hughes, 9 Eq. 475; Taylor *v.* Bowers, 1 Q. B. D. 291.

(*r*) Tenant *v.* Elliott, 1 Bos. & P. 3; Farmer *v.* Russell, Id. 296; Bousfield *v.* Wilson, 16 Mees. & W. 185; Nicholson *v.* Gooch, 5 El. & B. 999.

partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and copartners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for their share of what he has received. Upon this principle, it was held, in Sharp *v.* Taylor, (*s*) that a partner was entitled to an account against his copartner of moneys actually come to the hands of the latter from the employment of a ship in a manner not permitted by the navigation laws; and, in Sheppard *v.* Oxenford, (*t*) that the directors of an illegal company were liable to account *for the money received by them on behalf of the company and for the use of its members. *108]

Illegality set up by executors.—An executor or administrator of a deceased partner cannot protect himself from accounting for the estate of the deceased by setting up against his creditors, legatees or next of kin the illegality of the transactions in which the deceased may have been concerned. (*u*) That has nothing to do with their claims; and the reasons upon which the maxim *"Ex turpi causa non oritur actio"* is founded evidently have no application to such a case. Even if the executor was one of the deceased's copartners, and was thus mixed up with him in the illegal transactions, still, if the share of the deceased in the gains arising from them has actually been placed to his credit in the partnership books, and has come, or might have come to the hands of the executor as such, he must account for that share. (*x*) But if there has been no account settled, it would seem that the executor may, in his character of partner, rely on illegality, and decline to come to any account in respect of the gains in question. (*y*)

Illegal trusts.—But, notwithstanding Tenant *v.* Elliott, Sharp *v.* Taylor, and other cases of that class, illegal trusts will not be enforced. Sykes *v.* Beadon, (*z*) already referred to, is a clear authority for this proposition. Another authority is Ottley *v.* Browne. (*a*) There A, who was a shareholder with B and others in two companies, wished to become a banker; and in order to evade a statute which rendered it

(*s*) 2 Ph. 801, recognized in Sheppard *v.* Oxenford, 1 Kay & J. 491. Compare Sykes *v.* Beadon, 11 Ch. D. 170.

(*t*) 1 Kay & J. 491. See, too, Butt *v.* Monteaux, Id. 98.

(*u*) See Joy *v.* Campbell, 1 Sch. & L. 339; Hale *v.* Hale, 4 Beav. 369.

(*x*) See Joy *v.* Campbell, 1 Sch. & L. 328.

(*y*) See Ottley *v.* Browne, 1 Ball & B. 360; and compare Sharp *v.* Taylor, 2 Ph. 801.

(*z*) 11 Ch. D. 170, *ante* p. *105.

(*a*) 1 Ball & B. 360; and see Ex parte Mather, 3 Ves. 373.

illegal for a banker to be a partner in commercial undertakings, (*b*) A assigned his shares to B in trust for himself. B, who carried on a separate trade, was made bankrupt, and his assignees sold all his shares in the above companies, and also the shares held by him in trust for A. A then filed a bill against B's assignees, praying that they might be declared trustees of these last shares for him, A, and that they might be ordered to pay the value *thereof to him, or that he might be at liberty to prove for such value against B's estate; but [*109 the bill was dismissed with costs, on the ground that it sought to enforce a secret trust, which was directly against a positive law. (*c*)

Indictment.—Before quitting the subject of the consequences of the illegality of a partnership, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business, whether partners or not, and whether incorporated or not, are liable to be punished criminally; (*d*) and even where the object of a society is not illegal, its directors and managers will do well to bear in mind that if they willfully violate the provisions of an act of parliament, they are guilty of a misdemeanor, and are liable to be indicted accordingly. (*e*)

(*b*) 29 Geo. II., c. 16 (Irish).

(*c*) The same principle is illustrated by Thomson *v.* Thomson, 7 Ves. 470, which, however, was not a partnership case.

(*d*) See the title "Conspiracy" in Russell on Crimes, and Archbold's Criminal Law.

(*e*) See Lord Campbell's observations, in Longworth's Executor's Case, 1 De G., F. & J. 31.

*110] # *CHAPTER VI.

OF THE GENERAL NATURE OF A PARTNERSHIP.

SECTION I.—OF THE MERCANTILE AND LEGAL NOTION OF A FIRM.
SECTION II.—CONSEQUENCES OF THE NON-RECOGNITION OF THE FIRM IN THE MERCANTILE SENSE.

SECTION I.—OF THE MERCANTILE AND THE LEGAL NOTION OF A FIRM.

Mercantile view of a firm.—Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm.(*a*) Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts the *firm* is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the *firm* for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the *firm* is considered as continuing the same, and the rights and obligations of the old firm are regarded as continuing in favor of or against the new firm as if no changes had *occurred. The partners are the agents and sureties of the firm—its agents for the transaction of its business; [*111

(*a*) See, on this subject, Cory's Treatise on Accounts (2d ed., 1839, Pickering), a valuable work, but, it is believed, not so widely known as it should be. See, too, a paper by J. M. Ludlow, Esq., "On the Mercantile Notion of the Firm, and the Need of its Legal Recognition," in the second volume of the papers read before the

its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

Legal view of a firm.—But this is not the legal notion of a firm. The firm is not recognized by lawyers as distinct from the members composing it. (*b*) [1] In taking partnership accounts and in administering partnership assets, courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms; (*c*) but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; and any change amongst them destroys the identity of the firm. What is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his copartners, but he cannot be either debtor or creditor of the firm of which he is himself a member. (*d*)

A member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his copartners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority. But a partner is not the surety of the firm. Every member of an ordinary partnership, however numerous the partners may be, is liable as a principal to have his private property seized for a partnership debt, whether the firm has assets to pay it or not; and not only so, but the property of the firm is liable to be seized for the private debts of any of *the partners composing it. (*e*) This non-recognition of the firm, in the mercantile

*112]

Juridical Society, p. 40. To both of these the writer desires to acknowledge his obligations.

(*b*) Ex parte Gliddon, 13 Q. B. D. 43; Hoare *v.* Oriental Bank Corporation, 2 App. Cas. 589, illustrate this; and see per James, L. J., in Ex parte Corbett, 14 Ch. D. 126.

1. Each member of a firm of lawyers may be taxed separately, under an authority to tax all persons exercising any profession; one member of such firm cannot require that the *firm* and not the individual members shall be taxed. Lanier *v.* The Mayor, 59 Ga. 187.

(*c*) Rules of Sup. Ct., Ord. 16, rule 14; Bank. Act, 1883, § 115, and Bank. Rules, 1886, rule 259.

(*d*) See Lord Cottenham's judgment in Richardson *v.* The Bank of England, 4 Myl. & C. 171, 172; and De Tastet *v.* Shaw, 1 B. & A. 664.

(*e*) See "Execution," in book II., ch. 3, § 4.

sense of the word, is one of the most marked differences between partnerships and incorporated companies.

SECTION II.—CONSEQUENCES OF THE NON-RECOGNITION OF THE FIRM IN THE MERCANTILE SENSE.

1. *Generally, as regards its name.*

Name of a firm.—It follows from the foregoing remarks that the name under which a firm carries on business is, in point of law, a conventional name, applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. (*f*) When a firm is spoken of by its name or style, evidence is admissible to show who in fact constituted the firm at the time in question; (*g*) and if persons trade or carry on business under a name, style or firm, whatever may be done by them under that name is as valid as if real names had been used. This is seen every day in the case of bills of exchange and promissory notes; and even in the case of more formal instruments, there is no doubt of their validity, although some of the executing parties may be described as A & Co. (*h*) So, partners may be registered as shareholders in the name of their firm; (*i*) and, under the Copyright act, 5 and 6 Vict., c. 45, *and Engravings act, 8 Geo. II., c. 13, § 1, it is sufficient to register a book in the [*113 name of the firm, (*j*) or to print the name of the firm of proprietors under the engravings. (*k*) 2

(*f*) A firm is usually described in legal proceedings as certain persons trading or carrying on business under and using the name, style and firm of, &c. As to the sufficiency of this description, see Smith *v.* Ball, 9 Q. B. 361.

(*g*) Carruthers *v.* Sheddon, 6 Taunt. 15; Bass *v.* Clive, 4 Mau. & S. 13; Stubbs *v.* Sargon, 2 Keen 255, and 3 Myl. & C. 507; Latouche *v.* Waley, Hayes & J. Ir. Ex. 43.

(*h*) See Maughan *v.* Sharpe, 17 C. B. (N. S.) 443, a mortgage; Brutton *v.* Burton, 9 Chitty 707, a warrant of attorney; Evans *v.* Curtis, 2 Car. & P. 296, an agreement for a lease; Moller *v.* Lambert, 2 Camp. 548, a bond; Gorrie *v.* Woodley, 17 Ir. C. L. 221, a guarantee; Latouche *v.* Waley, Hayes & J. Ir. Ex. 43. How far the firm is bound by instruments on which its true name does not appear will be seen hereafter; and see, as to the parties to sue on a covenant with a firm, Metcalf *v.* Rycroft, 6 Mau. & S. 75, noticed *infra*, book II., ch. 3.

(*i*) Weikersheim's Case, 8 Ch. 831.

(*j*) Weldon *v.* Dicks, 10 Ch. D. 247.

(*k*) Rock *v.* Lazarus, 15 Eq. 104.

2. Firm name, generally.—The parties

Effect of change amongst the partners.—But as the name of a firm is only a conventional mode of designating the persons composing it, any variation amongst these persons is productive of a new significa-

to a copartnership may give it just such a name as they please, and all contracts or obligations or notes, made with or given to such firm, may be prosecuted in the individual names of its members. Crawford *v.* Collins, 45 Barb. (N. Y.) 269; 30 How. Pr. 398.

Persons doing business under a corporate name, if not a corporation, are, it is said, inferred to be a partnership. Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229.

It is not necessary, in general, in deriving a title through the endorsement of a firm, to allege in particular who the persons are composing that firm; for if the endorsement be made in the name of the firm, by a person duly authorized, it gives a complete title, whoever may compose the firm. Nor is it necessary, in a declaration at the suit of the executor of a surviving partner, to set forth the names of the firm. Childress *v.* Emory, 8 Wheat. (U. S.) 642.

Again, no firm name need be agreed upon in the partnership articles. If there is evidence of an agreement to buy and sell on joint account for mutual profit, and if one partner, with the knowledge and assent, express or implied, of the other, is in the habit of using a certain name, it is sufficient to fix the liability of the firm upon a note signed with that name. Parsley *v.* Ramsey, 31 Ga. 403. So, it is not necessary that two firms, in different localities, entering into an agreement, in express terms, creating a partnership for the carrying on of a special business, should adopt any partnership or firm name. Wright *v.* Hooker, 10 N. Y. (6 Seld.) 51. And where the same parties carry on the same business at different places, under different partnership names, there are not two distinct firms; the assets of both nominal firms are equally applicable to the payment of all creditors of both. Re Williams, 3 Woods (U. S.) 493.

Where in the articles no name was agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out at their warehouse, in the name of "H. & J.," it cannot be questioned but that a name thus assumed, recognized and publicly used, became the legitimate name and style of the firm, as fully as if it had been adopted by the articles of partnership. Le Roy *v.* Johnson, 2 Pet. (U. S.) 186.

An estimate for a corporation contract purported by its title to be made by W. and D., under the name and style of D., W. & Co. It was subscribed by each individual name, and also by the firm name. *Held*, that it was to be treated as a partnership act, and not as that of the individual partners. People *v.* Croton Aqueduct Board, 5 Abb. (N. Y.) Pr., 316; affirmed, 6 Id. 42; S. C., 26 Barb. 240.

F. C. and R. C. being in partnership, F. made a note, subscribing it "F. C. & R. C.," coupling the two names together. *Held*, sufficient, as a partnership signature, to charge R., in the absence of proof as to what was the firm name, except that in two instances the name of F. & R. C. was used. McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475.

Using name of one of the partners.—A firm may do business under the name of one of the partners alone, and can sue in all their names on contracts made in the name of such one alone. Martin *v.* Johnson, 8 Daly (N. Y.) 541. See, also, Ontario Bank *v.* Hennessey, 48 N. Y. 545. And bills of exchange, drawn

tion of the name. If, therefore, a legacy is left to a firm, the legacy is payable to those who compose the firm at the time the legacy

upon and accepted by the partner whose name is so used, will be recoverable against the firm, in the absence of proof that such partner also carried on business on his private account. Bank of Rochester *v.* Monteath, 1 Den. (N. Y.) 402; Palmer *v.* Stephens, Id. 471.

This right to use the name of one of the partners as a firm name is an exception to the rule that one partner executing an instrument intended to bind the firm must use the firm name. Williams *v.* Gillies, 75 N. Y. 197; reversing 13 Hun 422; 53 How. Pr. 429.

A partner is not necessarily to be deemed dormant because his name does not appear in the firm style. If he is not an ostensible partner it is sufficient. And upon the question whether a member of a partnership is a dormant partner, evidence as to general reputation is admissible. Metcalf *v.* Officer, 2 Fed. Rep. 640; S. C., 1 McCrary (U. S.) 325.

Firm name need not be used to render firm liable.—When funds or property are obtained on the obligation of only a portion of the members of a firm, the fact that the property thus obtained goes to the use of the firm is not of itself sufficient to render the firm liable. But where the property is not only obtained for and applied to the benefit of the firm, but is so obtained by the joint act and upon the joint written obligation of all its members, and the credit is given to all, the transaction is in substance a copartnership transaction, though the firm name is not actually used in the writing, and though the partners may have superadded to their joint obligation the several liability of each of them. Ct. of App., Jan., 1879. Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535, 540; affirming 13 Hun 506. Such an obligation is payable out of the firm assets, although the firm name is not mentioned therein, and it appears upon its face to be simply the obligation of the copartners contracted in their individual names. Ib.

Presumptions from use or disuse of firm name.—Until a firm name is adopted the presumption is that each member is the agent of the others to transact the firm business, even to the signing of the names of the several members of the firm to writings executed in its legitimate business. Kitner *v.* Whitlock, 88 Ill. 514.

Where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by him, the presumption is that it is the note of the individual, and not of the partners. Plaintiff, in order to recover against the partners, must not only prove execution of the note, but also that the money was borrowed on the credit of the partnership, or used in its business. Oliphant *v.* Mathews, 16 Barb. (N. Y.) 608.

It is no objection to a suit, upon notes payable to the plaintiff firm by their firm name, that their consideration was a sale of goods to the defendant at a previous time when one Vose was a partner, and the fact is immaterial. Whitlock *v.* McKechnie, 1 Bosw. (N. Y.) 427.

The use of "and company," after a firm name, creates a presumption that there is a partner not named, which, however, may be overcome by positive proof. Ib; The Francis, 1 Gall. (U. S.) 618; The San José Indiano, 2 Id. 268. But see Robinson *v.* Magarity (28 Ill. 423), where it is held that there is no presumption of law or fact that a firm name includes more than one person; and if it is desired that the names of plaintiffs should be shown, the fact of partnership must be put in issue by a verified plea.

The mere fact that an abbreviated

vests; (*l*) and, if a legacy is left to the representatives of an old firm, it will be payable to the executors of the last survivor of the partners constituting the firm alluded to, and not to its successors in business. (*m*)

Advances to a firm.—Again, if trustees are authorized to lend money to a firm, and, after the death or retirement of one of the members, the trustees lend to the remaining members, this, it seems, would be a breach of trust on the part of the trustees. (*n*)

Agency.—An authority given to two partners to insure in their names does not authorize an insurance in the names of themselves and a third person afterwards taken into partnership with them. (*o*) So, if there be a firm, A, B and C, and it has an agent, D, and C retires from the firm, though D may continue the agent of the firm, he is no longer the agent of C, but only of A and B. (*p*) In Tasker *v.* Shepherd, two partners had appointed an agent for four years and a half. One of the partners having died before the expiration of that time, it was held that the surviving partner was under no obligation to continue the agent in his employ. The court held that the appointment had

*114] reference to the existing partnership only, *and that the contract was intended to be for four years and a half, provided the parties so long lived. (*q*) [3]

form, as "Chas. & Wm. Feickert," instead of "Charles Feickert and William Feickert," is used in describing the payees of a note, does not, as a matter of law, authorize the public to assume they were partners. Ryhiner *v.* Feickert, 92 Ill. 305.

(*l*) See Stubbs *v.* Sargon, 2 Keen 255, and 3 Myl. & C. 507. In Mayberry *v.* Brooking, 7 De G., M. & G. 673, a legacy of a debt due to A was held to pass A's interest in a debt due to him and his co-partners. See, also, Ex parte Kirk, 5 Ch. D. 800.

(*m*) Leak *v.* McDowall, 3 N. R. 185, M. R.; Kerrison *v.* Reddington, 11 Ir. Eq. 451. See Greville *v.* Greville, 27 Beav. 594.

(*n*) See Fowler *v.* Raynal, 2 De G. & S. 749, and 3 Macn. & G. 500.

(*o*) Barron *v.* Fitzgerald, 6 Bing. N. C. 201. But of course a continuance of the authority may be inferred from the dealings of the person giving it with the changing firms. See Pariente *v.* Lubbock, 8 De G., M. & G. 5.

(*p*) See Jones *v.* Shears, 4 Ad. & E. 832.

(*q*) Tasker *v.* Shepherd, 6 Hurlst. & N. 575.

3. Agency.—The agent of a firm is not the agent of the individual partners, but of the partnership, collectively. Johnston *v.* Brown, 18 La. Ann. 330.

An agency is revoked by the death of a member of the partnership, even though it arises from the fact of the partnership relation existing between the principal and the agent. Travers *v.* Crane, 15 Cal. 12. But compare Bank of N. Y. *v.* Vanderhorst (32 N. Y. 553), where it was held that where an agent of a firm, authorized to draw its moneys from the bank and apply the same to the uses of the firm, continues to do so after the death of one of the members, without knowledge on his part or on the part of the bank, of such

Offices held by a firm.—Upon the same principle, namely, that the name of the firm is only a conventional name for its members, if a firm is appointed by its mercantile name to any office, *e. g.*, the office of trustee, guardian or executor, the partners in the house at the time of its appointment to the office are the persons who, in point of law, are considered as filling it.(*r*) The firm as such cannot hold an office, nor can rights personal to the members of a given firm be exercised by new members who may be introduced into it,(*s*) nor by its successors in business,(*t*) unless they are clearly intended to exercise them.

Protection of name.—The name by which a firm is known is not of itself the property of the firm, and there is nothing at common law to prevent persons from carrying on business in partnership under any name they please, unless perhaps it purports to be the name of a corporation.(*u*)

But one firm is not at liberty to mislead the public by so using the name of another firm as to pass off themselves or their goods for that other, or for the goods of that other.(*x*) Moreover, an established firm can prevent a company from registering itself under the name of the firm.(*y*)[4]

death, he acts within the scope of his authority, and his acts bind the firm. See, also, Wilson *v.* Stewart, 5 Pa. L. J. 450.

So, also, the dissolution of a partnership revokes a power of attorney given by the firm. Schlater *v.* Winpenny, 75 Pa. St. 321. But a mere change in the name of a firm, the firm under the new name being composed of the same persons as that under the old one, does not revoke an agency conferred upon it. Billingsley *v.* Dawson, 27 Iowa 210.

S. was a member of a transportation firm, and carried on the business at A., and a similar business at the same place alone, and drew checks in the name of "S., agent," indifferently, in his own and the firm business. The firm being sued on such checks—*Held*, that the other partners had a right to prove that the checks in question were drawn on the private account of S. Mechanics' and Farmers' Bank *v.* Dakin, 24 Wend. (N. Y.) 411.

(*r*) De Mazar *v.* Pybus, and Knudson *v.* Pybus, 4 Ves. 649.

(*s*) See Barron *v.* Fitzgerald, 6 Bing. N. C. 201; Stevens *v.* Benning, 1 Kay & J. 168.

(*t*) Hole *v.* Bradbury, 12 Ch. D. 886.

(*u*) See, as to this, *ante* p. *93.

(*x*) See Lee *v.* Haley, 5 Ch. 155; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748; reversing S. C., 6 Ch. D. 574; Burgess *v.* Burgess, 3 D. G. M. 896. See, also, Singer Machine Manufacturers *v.* Wilson, 3 App. Cas. 376, and Singer Man. Co. *v.* Loog, 18 Ch. D. 395, and 8 App. Cas. 15; Braham *v.* Beachim, 7 Ch. D. 848.

(*y*) Hendricks *v.* Montagu, 17 Ch. D. 638. The Copyright acts have no application to mere names. See Maxwell *v.* Hogg, 2 Ch. 307.

4. Protection of name.—A purchaser of all the partnership property, on the dissolution of a firm, does not thereby acquire the right to use the firm name as a label

Name a trade-mark.—The name of a firm may moreover be registered as a trade-mark for particular classes of goods (46 and 47 Vict., c. 57, §§ 64 and 65), and if so registered it is capable of being assigned in connection with the good will of the firm. Section 70. Registration is equivalent to antecedent use. Section 75. Provision is made *to prevent the improper registration of the same trade-mark by several persons. Section 72. [*115

Changes and mistakes in name of a firm.—Speaking generally, the rights and liabilities of a firm cannot be affected by a change in its name, unaccompanied by a change amongst its members. Regarded as a trade-mark, and in connection with good will, a change in name may be attended by important consequences, but, in other respects, it matters little; for so long as there is no change amongst the members, the different names they assume all denote the same persons. It must not, however, be concluded that one partner can bind his copartners by using a name under which he and they do not carry on business, and the use of which they have not sanctioned; and, as will be seen hereafter, he has no power so to bind them. (*z*) Moreover, a mistake in the name of a firm may be important; *e. g.*, under the Copyright act, if the owners of a copyright carry on business in partnership, and are not registered properly, they cannot sue for an infringement. (*a*)

2. *In legal proceedings.*

Actions by and against firms.—The non-recognition of the firm, in

on his goods, or to advertise himself as successor of such firm, and will be restrained in so doing. Reeves *v.* Denicke, 12 Abb. (N. Y.) Pr., N. S., 92.

A company claiming to have been incorporated under the laws of Michigan, commenced business in Illinois under an assumed corporate name. Subsequently another company became incorporated by the same corporate name, under the laws of Illinois, and commenced business in the same city in which the first mentioned company was established. The company organized under the laws of Illinois sued to restrain the persons composing the other company from continuing to do business under the corporate name, alleging that the defendants' pretended corporation no longer existed. *Held*, not sufficient ground for the relief sought. If the defendants were no longer incorporated, or if their original organization as a corporation was illegal, they still had a right to prosecute their business as partners, and under any name they saw fit to adopt. Ottoman Cahvey Company *v.* Dane, 95 Ill. 203.

(*z*) See, as to this, Kirk *v.* Blurton, 9 Mees. & W. 284, and other cases of that class, noticed *infra*, book II., ch. 1, § 5.

(*a*) Low *v.* Routledge, 1 Ch. 42.

a mercantile sense, was very apparent when it had to sue or be sued at law; for,

1. A firm could neither sue nor be sued otherwise than in the names of the partners composing it. (*b*)

2. Consequently, no action could be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person, at least, would appear both as plaintiff and as defendant, and it was considered absurd for any person to sue himself even in form. (*c*)

3. For the same reason, one firm could not bring an action *116] *against another if there were one or more partners common to both firms. (*d*)

So, if one member of a firm drew a bill on the firm, and the bill was accepted in the name of the firm, the drawer could not sue the firm on such a bill; for he, as one of the firm, was liable as an acceptor, and ought, therefore, to be a defendant to the action in which he was plaintiff. (*e*)

The extent to which these rules have been modified by modern legislation will be examined hereafter. (*f*) They are alluded to here in order to show the logical consequences which flow from the non-recognition of any such entity as a firm. In bankruptcy, however, the firm is often recognized, as will be seen hereafter. [5]

(*b*) See *infra*, book II., ch. 3. A corporation may sue in a name it has acquired by reputation. The Dutch West India Co. *v.* Moses, 1 Str. 612. As to actions by individuals who have assumed to act as a corporation, see Cooch *v.* Goodman, 2 Q. B. 580.

(*c*) De Tastet *v.* Shaw, 1 B. & A. 664; Richardson *v.* The Bank of England, 4 Myl. & C. 171, 172.

(*d*) Bosanquet *v.* Wray, 6 Taunt. 597, Mainwaring *v.* Newman, 2 Bos. & P. 120.

(*e*) See Neale *v.* Turton, 4 Bing. 149. Compare Beecham *v.* Smith, El., B. & E. 442, where the note sued upon was the several note of the defendants.

(*f*) See *infra*, book II., ch. 3.

5. Actions in the firm name.—The prevailing rule in this country is that copartners must sue and be sued in their proper names; it is not sufficient to use the style of the firm. Seeley *v.* Schenck, 1 Pen. (N. J.) 75; Crandall *v.* Denny, Id. 137; Burns *v.* Hall, Id. 984; Bentley *v.* Smith, 3 Cai. (N. Y.) 170; Tomlinson *v.* Burke, 5 Halst. (N. J.) 295; Porter *v.* Cresson, 10 Serg. & R. (Pa.) 257; Pate *v.* Bacon, 6 Munf. (Va.) 219; Marshall *v.* Hull, 8 Yerg. (Tenn.) 101; Smith *v.* Canfield, 8 Mich. 493. In some jurisdictions, however, a partnership may sue on a debt due to the firm in the partnership name. Johnson *v.* Smith, 1 Morr. (Iowa) 105; Abernathy *v.* Latimore, 19 Ohio 286. See, also, Haskins *v.* Alcott, 13 Ohio St. 210. In Texas, if the individual names appear in the petition, the name of the firm may be used in the citation. Andrews *v.* Ennis, 16 Tex. 45.

So, also, an unincorporated company can-

Effect of change in a firm on its rights and liabilities.—Another most important consequence of the principle that on any change amongst the persons composing a partnership there is, in fact, a new partnership, and not a mere continuation of the old one, is that although, upon a change in a firm, it may be agreed between the members of the old and new firms that the rights and obligations of the old shall devolve upon the new partners, this has no effect upon third parties, unless they accede to it. As to them it is *res inter alios acta*, and there is no principle by virtue of which the existing rights or obligations of non-partners can be affected, either for better or for worse, by agreements to which they are strangers. This subject will be alluded to hereafter. (*g*)

3. *Partnership disabilities.*

Disabilities of one partner affecting the firm.—Speaking generally, no person can do by his agent what he cannot do himself; and although each member of a firm is a principal as regards his own conduct, he is the agent of his copartners, and he cannot therefore do for

not sue in the name of the firm. Davis *v.* Hubbard, 4 Blackf. (Ind.) 50; Hughes *v.* Walker, Id. 50.

In California a complaint brought in a firm name, and not stating the names of the members as plaintiffs, is defective, and may be demurred to, but the defect cannot be availed of by appeal. Gilman *v.* Cosgrove, 22 Cal. 356. Such a complaint is good after verdict. Pate *v.* Bacon, 6 Munf. (Va.) 219.

In South Carolina a summary process brought in the mercantile name of a firm, without setting out the partnership or the Christian names of the partners, is bad upon exception by plea; but not on motion for nonsuit. Martin *v.* Kelly, Cheves (S. C.) 215.

Where a foreign firm is sued in its firm name and answers, and a verdict is taken upon the defence set up in the answer, without objection to the irregularity, the firm will be deemed to have waived their legal right to object. Brownson *v.* Metcalfe, 1 Handy (Ohio) 188.

Where plaintiff, in fact, assuming to act, not as a corporation, but as a partnership, sues by a name importing a corporation, the point may be raised by an answer alleging want of parties in interest to the suit. Heaston *v.* Cincinnati, &c., R. R. Co, 16 Ind. 275.

In Iowa, where a note is made payable to a firm by its name, it is advisable to declare thereon in the name of the firm; but if the names of the several partners are set out, it is not necessary to prove them. Gordon *v.* Janney, 1 Morr. (Iowa) 182; Bernard *v.* Parvin, Id. 309.

A judgment in favor of "L. & M.," trading as a firm, is valid, and is competent evidence, in a suit brought by the firm, that the judgment was recovered by the partnership, their individual names being set out in full. Lash *v.* Arnold, 8 Jones (N. C.) L. 91.

(*g*) See *infra*, book II., ch. 2, § 3.

the firm what they cannot do. In other words, the disability of one of the partners affects the whole firm. Illustrations of this doctrine will *be found in book II., ch. 3, § 1, relating to defences to actions by partners. Further illustrations are afforded by [*117 those cases which preclude a firm of solicitors or any of its members from doing work which one of the members cannot do. (*h*)

Again, there are rules in bankruptcy which prevent the partners of the trustee, registrar or official receiver from doing various acts which they might do if they were not in partnership with him. (*i*)

By 50 and 51 Vict., c. 58, § 40, no inspector of a coal mine can be a partner in it, nor can a partner of any land agent, mining engineer, &c., be an inspector.

4. *As regards sureties and securities.*

Effect of change in a firm on the position of its sureties.—It is a principle of the law of suretyship that any act on the part of the principal creditor which alters the risk of the surety without his consent, discharges him from future liability. (*k*)

Sureties to a firm.—If, therefore, a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body or not. If he did, his liability is not discharged by any change amongst the members constituting the partnership at the time he became surety; (*l*) but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged (see 19 and 20 Vict., c. 97, § 4, on the

(*h*) See Duke of Northumberland *v.* Todd, 7 Ch. D. 777, as to swearing affidavits.

(*i*) See Bank. Act, 1883, §§ 88, 116, (2); sched. 1, r. 26; Bank. R. 1886, r. 56, (2), 113, 114.

(*k*) See, as to sureties, the note to Arlington *v.* Merrick, 2 Wms. Saund. 414. As to the discharge of apprentices and their sureties by a change in the firm to which they are bound, see Lloyd *v.* Blackburne, 9 Mees. & W. 363; R. *v.* St. Martin's, 2 Ad. & E. 655.

(*l*) Pease *v.* Hirst, 10 Barn. & C. 122; Metcalf *v.* Bruin, 12 East 400, and 2 Camp. 422; and see Barclay *v.* Lucas, 1 T. R. 291, note; Kipling *v.* Turner, 5 B. & A. 261. In Pariente *v.* Lubbock, 8 De G., M. & G. 5, an authority to a firm of consignees, to recognize the consignor's son as his agent, was held to continue, notwithstanding changes in the firm, as long as the consignor continued his business connection with the firm.

*118] next page); *and consequently any change in it, whether by death (*m*) or the retirement (*n*) of a partner, or by the introduction of a new partner, (*o*) immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damnified by the change or not, he has a right to say *non in hæc fœderaveni*.

Sureties for a firm.—Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm. (*p*) Moreover, a person who becomes surety for another is not necessarily surety for his conduct as a partner, and obviously not for the conduct of himself and his copartner. (*q*) [6]

Effect of incorporation.—Again, if a person becomes surety to several people for the conduct of a servant in their employ, and those people are afterwards incorporated, the surety is discharged, for the person created by the act of incorporation is different from the persons in whose employ the servant was, and with whom the surety contracted. (*r*) On precisely similar grounds it is conceived that a person who becomes surety to a corporation for the conduct of one of its servants would be discharged by the amalgamation of that corporation with another; for the two together would be a different body from either of its amalgamated members. (*s*) But a mere change of name consequent on registration with limited liability has not this effect. (*t*)

**Mercantile Law Amendment act.*—The doctrines established in the foregoing cases have been expressly sanctioned by [*119

(*m*) Holland *v.* Teed, 7 Hare 50; Strange *v.* Lee, 3 East 484; Weston *v.* Barton, 4 Taunt. 673; Pemberton *v.* Oakes, 4 Russ. 154; Simson *v.* Cooke, 1 Bing. 452; Chapman *v.* Beckington, 3 Q. B. 703; Backhouse *v.* Hall, 6 N. R. 98, Q B.

(*n*) Myers *v.* Edge, 7 T. R. 254; Dry *v.* Davey, 10 Ad. & E. 30; and see Solvency Mutual Guarantee Co. *v.* Freeman, 7 Hurlst. & N. 17.

(*o*) Wright *v.* Russell, 2 W. Bl. 934.

(*p*) Bellairs *v.* Ebsworth, 3 Camp. 53; University of Cambridge *v.* Baldwin, 5 Mees. & W. 580; Simson *v.* Cooke, 1 Bing. 452; 19 and 20 Vict., c. 97, § 4.

(*q*) The London Assurance Co. *v.* Bold, 6 Q. B. 514; Montifiore *v.* Lloyd, 15 C. B. (N. S.) 203, where the partnership was known to the surety.

6. See Leabo *v.* Goode, 67 Mo. 126; Gates *v.* Hughes, 44 Wis. 333.

(*r*) Dance *v.* Girdler, 1 Bos. & P. (N. R.) 34.

(*s*) In The Eastern Union Railway Co. *v.* Cockrane, 9 Ex. 197, and The London, Brighton and South Coast Railway Co. *v.* Goodwin, 3 Ex. 320, the surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject.

(*t*) Groux's Soap Co. *v.* Cooper, 8 C. B. (N. S.) 800.

the legislature, it being enacted by the Mercantile Law Amendment act (*u*) that:

"No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Effect of change in firm on its securities.—Questions nearly akin to those just alluded to arise where securities have been deposited with bankers to secure future advances, and a change has occurred in the banking firm before the making of some of the advances. *Prima facie*, the securities extend only to those advances which are made by the firm whilst its members continue the same as when the securities were deposited. (*x*) And similarly, if a partner pledges his separate property for future advances to be made to his firm, and he afterwards dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged. (*y*) It has even been held that if a person deposits deeds as a security for advances to be made to *him*, the security does not cover advances made to him and his partners. (*z*)

Equitable mortgagees.—However, it is established that an equitable mortgage by deposit of title deeds may be extended, even by parol, to cover advances made after a change in the firm with which the deeds are lodged. (*a*) And although a legal mortgage to a firm *cannot be converted into an equitable mortgage merely by parol, (*b*) it may be so converted by a written agreement, and may as

*120]

(*u*) 19 and 20 Vict., c. 97, § 4. See, on this section, Backhouse *v.* Hall, 6 Best & S. 507, and 6 N. R. 98, Q. B.

(*x*) See per Lord Eldon in Ex parte Kensington, 2 Ves. & B. 83.

(*y*) Bank of Scotland *v.* Christie, 8 Cl. & F. 214.

(*z*) Ex parte Mackenna, 3 De G., F. & J. 629; Ex parte Freen, 2 Glyn & J. 246. See, too, Chuck *v.* Freen, 1 Moo. & M. 259. These cases turn on the terms of the memoranda of deposit, and on the circumstances under which the securities are given.

(*a*) Ex parte Lloyd, 1 Glyn & J. 389; Ex parte Lane, De G. 300; and see Ex parte Nettleship, 2 Mont., D. & D. 124.

(*b*) Ex parte Hooper, 2 Rose 328.

an equitable mortgage become available as a security for advances made after a change in the firm to which the legal mortgage was originally given. (*c*) Owing to these doctrines a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security, and a slight manifestation of intention on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself, as well as those made by the old firm, have been repaid. (*d*)

Lien of solicitors.—The lien which a firm of solicitors has on the deeds, &c., of its clients, is not lost by a mere change in the firm. (*e*) But a solicitor's lien only attaches where the papers on which the lien is claimed have come to the possession of the very persons to whom the client is legally indebted, whence it follows that papers which come into the possession of a firm after the introduction of a new partner (*f*) or the retirement of an old one, (*g*) cannot be retained for a debt due before the change in the firm took place. The death of a partner is not, however, it is conceived, equivalent to retirement, for the survivors become the legal creditors, and there is, therefore, no reason why they should not have a lien for a debt due to them and their deceased partner on papers coming into their possession after his death.

A dissolution of a partnership between solicitors operates as a discharge by them of their client, and any lien they may have on his papers is subject to his right to have them handed over to a fresh solicitor for the purpose of enabling him to finish business of the client pending at the time of dissolution. (*h*) [7]

(*c*) Ex parte Parr, 4 Dow & C. 426.

(*d*) See Ex parte Kensington, 2 Ves. & B. 79; Ex parte Marsh, 2 Rose 239; Ex parte Loyd, 3 Deac. 305; Ex parte Alexander, 1 Glyn & J. 409.

(*e*) Pelly *v.* Wathen, 7 Hare 351, affirmed, 1 De G., M. & G. 16.

(*f*) Re Forshaw, 16 Sim. 121; Pelly *v.* Wathen, 7 Hare 351.

(*g*) Vaughan *v.* Vanderstegen, 2 Drew. 409.

(*h*) Griffiths *v.* Griffiths, 2 Hare 587; Rawlinson *v.* Moss, 7 Jur. (N. S.) 1053, V. C. W.

7. Partnerships between attorneys are subject to the ordinary incidents of mercantile partnerships. One partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract, and a right of action against the firm survives against the survivor alone. Livingston *v.* Cox, 6 Pa. St. 360.

A dissolution of such a partnership does not affect engagements made during its existence, so far as their clients are concerned. Walker *v.* Goodrich, 16 Ill. 341.

If such a firm accept a retainer, the contract is joint, and continues to the termination of the suit, and neither attor-

ney can be released from the obligation or responsibilities assumed, either by a dissolution of the firm, or any other act or agreement between the attorneys themselves. Ib. And see Smyth *v.* Harvie, 31 Ill. 62.

Where one of the partners receives a retainer, conducts the trial and charges the fee therefor on the books of the firm, the presumption will be of a retainer of the firm, and that the fee accrued to the firm. Harris *v.* Pearce, 5 Bradw. (Ill.) 622.

An attorney who has received notes to collect is individually responsible for care and diligence, although he notifies his client that he has a partner who attends to the collecting; unless the client has recognized the partnership in the transaction of his business. Mardis *v.* Shackleford, 4 Ala. 493. So, attorneys who are partners are equally responsible for money collected and not paid over, though one of them had no participation in the particular transaction. Dwight *v.* Simon, 4 La. Ann. 490.

A claim was placed in the hands of two attorneys, partners, for collection, a judgment obtained, land of the debtor sold under execution, and redemption made from the sale by paying the money to the sheriff, who paid it over to one of the attorneys. Prior to the redemption the copartnership between the attorneys was dissolved. *Held*, that both partners were liable to the client for the money thus received by one of them after dissolution. Smyth *v.* Harvie, 31 Ill. 62.

*CHAPTER VII. [*121

OF THE DURATION OF CONTRACTS OF PARTNERSHIP—OF PARTNERSHIPS AT WILL AND FOR A TERM.

Partnerships at will and for a term. Prima facie, partnerships are at will.—A contract of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time. In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved. (*a*) Such an agreement may be established as well by direct evidence as by implication from the acts of the partners; and it is not possible to lay down any rule by means of which the intention of the partners on this head can be certainly ascertained, where no express agreement has been come to. One or two points, however, on the subject have been decided, and demand notice. [1]

Effect of existence of debts.—The mere fact that a firm has incurred debts, and charged its assets for their payment, is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution. (*b*)

Effect of taking a lease.—Again, the fact that the partners have, for partnership purposes, taken land on lease for a term of years, is not proof of an agreement that the partnership between them shall subsist for the same period. This has been decided on several occasions, (*c*)

(*a*) See per Parke, J., in Heath *v.* Sanson, 4 B. & A. 175; Frost *v.* Moulton, 21 Beav. 596, and the cases cited in the following notes.

1. Duration of partnership as dependent on will of partner.—Where, in a copartnership agreement, no time is named for its continuance, and no provision made for the settlement of its concerns upon dissolution, it is dissolvable at the will of either of the partners. McElvey *v.* Lewis, 76 N. Y. 373; affirming 44 Super. Ct. 561; Skinner *v.* Tinker, 34 Barb. (N. Y.) 333; Pine *v.* Ormsbee, 2 Abb. (N. Y.) Pr., N. S., 375.

But where the articles prescribe a definite period for the firm's duration, this is enough, without any prohibition of an earlier dissolution, to prevent either partner from terminating the relation at will. Smith *v.* Mulock, 1 Robt. (N. Y.) 569; S. C., 1 Abb. Pr., N. S., 374. In such a case, it requires something more than the mere will of a party to dissolve it within the term. Bishop *v.* Breckles, 1 Hoffm. (N. Y.) 534.

(*b*) See King *v.* The Accumulative Assurance Co., 3 C. B., N. S., 151.

(*c*) Featherstonhaugh *v.* Fenwick, 17 Ves. 307; Jefferys *v.* Smith, 1 Jac. & W.

and the reasons are thus given by Lord Eldon in Crawshay *v.* Maule, a leading case upon the subject:

"Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority *if I say
*122] that whenever there is a partnership the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership forever. It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade." (*d*)

Partnerships continued after their terms are expired.—Further, where a partnership, originally entered into for a certain number of years, is continued after their expiration, and there is no evidence as to the additional time for which the partnership was to last, it is treated as having become a partnership at will, and not as having been renewed for another definite period. (*e*) 2

Duration of subpartnerships.—So, if one of several partners forms a subpartnership with a stranger, the fact that the principal partner-

301; Alcock *v.* Taylor, Taml. 506; Burdon *v.* Barkus, 3 Giff. 412, and, on appeal, 4 De G., F. & J. 42.

(*d*) Crawshay *v.* Maule, 1 Swanst. 509.

(*e*) Neilson *v.* Mossend Iron Co., 11 App. Cas. 298; Featherstonhaugh *v.* Fenwick, 17 Ves. 307; Booth *v.* Parkes, 1 Moll. 465. See, also, Cuffe *v.* Murtagh, 7 Ir. L. 411.

2. Continuing after term has expired. —A partnership may be prolonged, by express or tacit consent, beyond the time stated in the articles. In that case, *prima facie*, the articles are still binding. Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165. Thus, a written agreement as to dividing profits may be extended tacitly by the mutual understanding of the parties, or by their conduct in relation to it. Robbins *v.* Laswell, 27 Ill. 365.

In Dickson *v.* Bold (3 Dessau. (S. C.) 501), a partnership having expired by the limitation in the articles, A, one partner, transmitted the articles to B, the other, with a renewal endorsed thereon, which B agreed to, provided he should be relieved from his difficulties by the arrival of a certain ship. The ship arrived, and B resumed his duties as partner. *Held*, that the partnership was renewed for the original term, though there was no formal renewal.

But a partnership is none the less ended because the party who, upon final settlement, turned over to the other as cash certain drafts and notes, is to be responsible for his proportion of the debts uncollected thereon, or is afterwards employed by the other in making the collections; nor because any specific property of the firm remains unsold, wherein each, under the settlement, retains his proportionate share. Sharpe *v.* Johnson, 59 Mo. 557.

ship has been entered into for a certain number of years is no proof that the subpartnership was intended to last for the same number of years, or for as many of them as were unexpired when the subpartnership was formed. (*f*)

Implied terms of duration.—On the other hand, in Wheeler *v.* Van Wart, (*g*) a company, the duration of which was not expressly fixed, was held to be intended to last at least until after a day appointed in its deed of settlement for the holding of a general meeting. And, in Reade *v.* Bentley, (*h*) it was considered that an agreement to the effect that a publisher should defray the expenses of a work written by an author, and should receive a percentage on the gross amount of sale, and that the net profits of each edition should be divided equally between both parties, amounted to an agreement for a joint adventure between the author and the publisher for so long as might be necessary to dispose of a complete edition; and that the publication of every new edition prolonged the partnership until that edition should *be disposed of; but that when any edition was exhausted either party was free to discontinue the joint adventure. [3] [*123

Causes of dissolution.—The right to rescind a partnership contract for fraud or misrepresentation will be discussed hereafter in book III.; and the right to dissolve a partnership, or to have it dissolved, and the consequences of its dissolution will be examined in book IV.

(*f*) Frost *v.* Moulton, 21 Beav. 596.

(*g*) 9 Sim. 193, and better in 2 Jur. 252.

(*h*) 4 Kay & J. 656; and 3 Id. 271.

3. Implied terms of duration.—"In the absence of an express there may be an implied contract as to the time for which a partnership shall endure (Crawshay *v.* Maule, 1 Swanst. 508), and where that is the case, the partnership cannot be destroyed by the act of the party until the contemplated period arrives." Gow on Part. 278.

In Walker *v.* Whipple (58 Mich. 476), the court would not decide whether any condition or limitation as to the duration of a partnership can be engrafted on the partnership contract, as an implication from its nature.

In Magill *v.* Merrie (5 B. Mon. (Ky.) 168), it was provided, in a contract of dissolution, that one partner was to withdraw and be paid a proportion of the profits when the estimates were made. *Held*, that such a one continued to be a partner until the estimates were made.

*124] # *BOOK II.

OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS REGARDS NON-PARTNERS.

CHAPTER I.

OF THE LIABILITIES OF PARTNERS FOR THE ACTS OF EACH OTHER.

SECTION I.—GENERAL PRINCIPLES OF AGENCY AS APPLIED TO ORDINARY PARTNERSHIPS, *124.

SECTION II.—LIABILITIES OF PARTNERS IN RESPECT OF ACTS WHICH ARE NEITHER TORTS NOR FRAUDS, *128.

SECTION III.—LIABILITY OF PARTNERS IN RESPECT OF TORTS AND FRAUDS, *147.

SECTION IV.—LIABILITY OF PARTNERS IN RESPECT OF ACTS WHICH ARE UNAUTHORIZED, AND ARE KNOWN SO TO BE, *167.

SECTION V.—OF THE LIABILITY OF PARTNERS IN RESPECT OF CONTRACTS NOT ENTERED INTO ON BEHALF OF THE FIRM, OR NOT SO IN PROPER FORM, *176.

SECTION VI.—LIABILITY OF PARTNERSHIPS IN RESPECT OF CONTRACTS NOT BINDING ON THEM, BUT OF WHICH THEY HAVE HAD THE BENEFIT, *189.

SECTION I.—GENERAL PRINCIPLES OF AGENCY AS APPLIED TO ORDINARY PARTNERSHIPS.

Each partner the agent of the firm.—Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of

the authority conferred by the nature of the business it carries on. (*a*) Whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. (*b*) But no person is entitled to assume that any partner has a more extensive authority than that above described.

The consequences of this principle are—

1. *General rules.*—That if an act is done by one partner on behalf of the *firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* [*125 be liable, although, in point of fact, the act was not authorized by the other partners.

2. That if an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be not liable.

In the first case, the firm will be liable unless the one partner had, in fact, no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners. (*c*) [1]

(*a*) The case is different with mere part ownerships. Barton *v.* Williams, 5 B. & A. 395; Helme *v.* Smith, 7 Bing. 709.

(*b*) See per James, L. J., in Baird's Case, 5 Ch. 733, and per Parke, B., in Hawken *v.* Bourne, 8 Mees. & W. 710. The fact that one partner ordinarily attends to one branch of the business does not prevent his binding the firm when acting out of his own department. Morans *v.* Armstrong, Arms., M. & O. Ir. N. P. Rep. 25.

(*c*) See Dickinson *v.* Valpy, 10 Barn. & C. 128, and Crellin *v.* Brook, 14 Mees. & W. 11, where there was sufficient ratification.

1. **Each partner the agent of the others, generally.**—The general rule is that one partner has a right to bind the firm to any extent in contracts for the use of the partnership. Manuf. and Mechanics Bank *v.* Gore, 15 Mass. 75; Boardman *v.* Gore, Id. 331; Pearson *v.* Post, 2 Dak. T. 220; Hall *v.* Cook, 69 Ala. 87; Hall *v.* Green, Id. 368; Galloway *v.* Hughes, 1 Bailey (S. C.) 553; Storer *v.* Hinkley, Kirby (Conn.) 147.

A leading case upon this subject is Winship *v.* Bank of United States (5 Pet. (U. S.) 529), where Marshall, C. J., said (p. 561): "Partnerships, for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which

Secret partnerships. Authority of dormant partner.—The doctrine that each member of any ordinary firm is its implied agent for the transaction of its business in the ordinary way, is generally laid down without qualification. But it is questionable whether this rule applies to a case in which a person who happens to be a member of a firm,

subserve the purpose of justice, and which society is concerned in sustaining. One of these is that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law."

Thus, one partner may transfer or assign a *chose in action*, or a debt due to the partnership, or any other partnership effects, so far as the same can be transferred or assigned in law. Quiner *v.* Marblehead Ins. Co., 10 Mass. 476; Lamb *v.* Durant, 12 Id. 54; Cullum *v.* Bloodgood, 15 Ala. 34; Harrison *v.* Sterry, 5 Cranch (U. S.) 289; Anderson *v.* Tompkins, 1 Brock. (U. S.) 456; Mills *v.* Barber, 4 Day (Conn.) 428; Randolph Bank *v.* Armstrong, 11 Iowa 515; Fromme *v.* Jones, 13 Iowa 474; United States Bank *v.* Binney, 5 Mason (U. S.) 176; Hodges *v.* Harris, 6 Pick. (Mass.) 360; Halsey *v.* Whitney, 4 Mason (U. S.) 206; Clark *v.* Rives, 33 Mo. 579; Boswell *v.* Green, 1 Dutch. (N. J.) 390; McClelland *v.* Remsen, 36 Barb. (N. Y.) 622; 14 Abb. Pr. 331; 23 How. Pr. 175.

Each member of a partnership is, in contemplation of law, the general agent of the firm, and has power to bind his copartners by acts done within the scope of the business of the partnership. Loudon, &c., Society *v.* Hagerstown, &c., Bank, 36 Pa. St. 498. This authority on the part of one partner arises from the confidential nature of the partnership relation. Brewster *v.* Hardeman, Dudley (Ga.) 138.

but who is not known to be such, and who has, in fact, no authority to act for it, takes upon himself so to do. Real authority is excluded by hypothesis, and it is difficult to see from what, in such a case, any authority can be implied. If, indeed, he was known to be a partner, whether by his own representations or otherwise, his authority to act for the firm would be properly inferred. But the case supposed excludes all knowledge of his position, and under such circumstances it is conceived there can be no apparent as distinguished from real authority. (*d*)

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract, and a right of action against the firm survives against the survivor alone. Livingston *v.* Cox, 6 Pa. St. 360.

Another way of stating the general rule is that the presumption is that contracts made by a partner are made on account of the partnership, and the firm will be bound thereby, unless the parties with whom he contracts know the contrary (Le Roy, Bayard & Co. *v.* Johnson, 2 Pet. (U. S.) 198; Rochester *v.* Trotter, 1 A. K. Marsh. (Ky.) 54), and this, whatever their liability *inter sese* may be. White *v* Kearney, 2 La. Ann. 639.

Thus, where the several obligees in a bond constitute a partnership, a delivery to one is a delivery to all. Moss *v.* Riddle, 5 Cranch (U. S.) 351.

But while every partner is in a sense a general agent of the firm, a firm is not necessarily the agent, general or special, of any other firm in which either of its members is a partner. Wright *v.* Ames, 4 Abb. (N. Y.) App. Dec. 644. So, where the same person is a partner in two firms, his acts, done in the name of one firm, cannot be proved in an action against the other, the same persons not comprising both firms. Kratzer *v.* Lyon, 5 Pa. St. 274.

Whenever there are written articles of agreement between partners, their power and authority, between themselves, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulation, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business. Kimbro *v.* Bullitt, 22 How. (U. S.) 256. Thus, a written contract of partnership, in an adventure limited to certain specified transactions, and to some definite duration, does not give to the partners such power to bind the firm as is possessed in cases of permanent and general mercantile transactions. Toof *v.* Duncan, 45 Miss. 48.

In private associations, the majority cannot bind the minority without special agreement, except in the case of partnerships and ship-owners. Livingston *v.* Lynch, 4 Johns. (N. Y.) Ch. 573. Nevertheless, the acts of the trustees of an unincorporated association, done in good faith, and within the scope of their authority, are binding upon the stockholders individually, in a suit against them by a creditor of the company, under the statute. Slee *v.* Bloom, 20 Johns. (N. Y.) 669.

(*d*) See the judgment of Cockburn, C. J., in Nicholson *v.* Ricketts, 2 El. & E.

Liability of dormant partners.—Again, with respect to the liability of dormant partners, a distinction must be drawn between—first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, *i. e.*, as principals only, and *not as agents for those who share their profits. In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way; but in the second case the so-called dormant partners are not principals at all; the persons who carry on their business do not carry it on as their agents, either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded. (*e*) [2]

*126]

524, and of Cleasby, B., in Holme *v.* Hammond, L. R., 7 Ex. 233.

(*e*) This distinction is rendered necessary by the decision of the House of Lords in Cox *v.* Hickman. See *ante* pp. *30, *et seq.*

2. How far the rule applies to dormant partners.—In the case of Winship *v.* Bank of United States (5 Pet. (U. S.) 562), Marshall, C. J., says, in continuation of his remarks quoted in the preceding note (p. *125): "The counsel for the plaintiff in error supposes that though these principles may be applicable to an open, avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner and one whose name was to the articles. But their responsibility in all partnership transactions is admitted to be the same. Those who trade with a firm on the credit of individuals, whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners who were not ostensible are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea that if partners are not openly named the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles. It has been supposed that the principles laid down in the third instruction respecting these secret restrictions are inconsistent with the opinion declared in the first; that in this case, where the articles were before the court, the question whether this was, in its origin, a secret or an avowed partnership, had become unimportant. If this inconsistency really existed, it would not affect the law of the case, unless the judge had laid down principles in the one or the other instruction which might affect the party injuriously. But it does not exist. The two instructions were given on different views of the subject, and apply to different objects. The first respected the parties to the firm and their liability, whether they were or were not known as members of it; the last applies

Necessity the limit of authority.—It will be observed that what is necessary to carry on the partnership business in the ordinary way is made the test of authority where no actual authority or ratification can be proved. This is conformable to the most recent and carefully considered decisions; but by adopting it, the liability of a firm for the acts of its copartners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be *necessary* for the carrying on of its business, if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. (*f*)

Extraordinary necessity.—Nor, it seems, will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin. (*g*) This case is an authority for saying that a power to do what is usual does not

to secret restrictions on the partners, which change the power held out to the world by the law of partnership. The meaning of the terms 'secret partnership,' or the question whether this did or did not come within the definition of a secret partnership, might be unimportant; and yet the question whether a private agreement between the partners, limiting their responsibility, was known to a person trusting the firm, might be very important."

The credit given in such a case, though manifestly given to the ostensible partner, is not to be presumed to be exclusive, but all for whom such partner acts, if in their business and for their benefit, will be liable. Richardson *v.* Farmer, 36 Mo. 35.

In Virginia an action may be maintained upon a promissory note against a secret partner who did not sign it; but he is not liable unless the money came to the use of the firm. Bank of Alexandria *v.* Mandeville, 1 Cranch (U. S.) C. C. 575.

But while, by the law merchant, one may be answerable as a dormant partner on a contract made by the partnership of which he is in fact a member; this law is confined to trade and commerce, and does not extend to speculations in the purchase and sale of lands; for where lands are sold, no man, as a dormant partner, can claim any part of the lands by virtue of any conveyance to which he is not, on the face of it, a party. Pitts *v.* Waugh, 4 Mass. 424.

(*f*) See Brettel *v.* Williams, 4 Ex. 630.

(*g*) See Hawtayne *v.* Bourne, 7 Mees. & W. 595; and see Ex parte Chippendale, 4 De G., M. & G. 19.

include a power to do what is unusual, however urgent; and although in the case referred to the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have *been the same if he had been a partner. [*127
For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his copartners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility. (*h*) [3]

(*h*) See Ricketts *v.* Bennett, 4 C. B. 686, and Dickinson *v.* Valpy, 10 Barn. & C. 128.

3. Discretion in urgent cases.— While it is a rule of general application that in the absence of a special agreement, neither partner can make any contract beyond the commercial custom of the business of the firm, without the consent of the other (Chandler *v.* Sherman, 16 Fla. 99), if that other can be consulted beforehand; still, if he cannot be consulted, and the exigencies of the case render it necessary for the partner on the spot to act, he may generally do so. Ex parte Daniels, 14 R. I. 500.

Thus, in Hunter *v.* Wayrick (67 Iowa 555), where a partner, who did not, but who might have consulted his copartner by mail or telegraph, without his knowledge or consent sold the entire property of the firm to one who knew the facts, it was held that the absent partner could repudiate the sale.

On the other hand, where one partner in a firm organized for a particular business does an act on account of the firm which is *prima facie* beyond the scope of his authority, it is competent to show that in the exercise of good faith and reasonable discretion he was waranted in so doing by the course pursued by the firm in the management of their business, and that consequently the other partners were bound by his act. Woodward *v.* Winship, 12 Pick. (Mass.) 430.

In Const *v.* Harris (Turn. & R. 496, 525), Lord Eldon says: "I call that the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting not for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority to say, 'We do not care what one partner may say, we, being the majority, will do what we please,' is, I apprehend, what this court will not allow." And at page 527, he continues: "In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded. What weight is to be given to it is another question. The most prominent point on which the court acts, in appointing a receiver of a partnership concern, is the circumstances of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership, as he, who assumes that power, himself enjoys."

Nature of the business the test of necessity.—The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is, therefore, necessarily admissible, and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business in the ordinary way may be wholly unnecessary for carrying on another. Consequently, no answer of any value can be given to the abstract question —Can one partner bind his firm by such and such an act?—unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which any such assertions can be truly made. The great majority of acts, and, practically, all which give rise to doubt are those which are necessary in one business and not in another. Take, for example, negotiable instruments; it may be necessary for one member of a firm of bankers to draw, accept or endorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it, in fact, true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept or endorse bills of exchange. The question, therefore, Can one partner bind the firm by accepting bills in its name? admits of no *128] general answer; the nature of the business and *the practice of those who carry it on (usage or custom of the trade) must be known before any answer can be given. (*i*) [4]

The question when the agency of a partner begins and ends will be examined hereafter, see book II., ch. 2, § 3.

(*i*) See Hogarth *v.* Latham, 3 Q. B. D. 643; Taunton *v.* Royal Ins. Co., 2 Hem. & M. 135.

4. **Nature of the business the test of the power to bind**—One member of a copartnership cannot be made liable for the act or undertaking of another, in a transaction not embraced in their original partnership business, unless proof is adduced that he knew of the transaction and assented to it. Goodman *v.* White, 25 Miss. 163; Steagale *v.* Coney, 49 Miss. 761; Hotchin *v.* Kent, 8 Mich. 526; Cayton *v.* Hardy, 27 Mo. 536; Welles *v.* March, 30 N. Y. 344; Bell *v.* Faber, 1 Grant (Pa.) Cas. 31; Nichols *v.* Hughes, 2 Bailey (S. C.) 109; Scott *v.* Bandy, 2 Head (Tenn.) 197; Venable *v.* Levick, Id. 351.

SECTION II.—LIABILITIES OF PARTNERS IN RESPECT OF ACTS WHICH ARE NEITHER TORTS NOR FRAUDS.

Having noticed the general principles determining the extent to which one partner is the agent of the firm, it is proposed to examine

Speculative dealings in "futures" by one partner in a firm dealing in grain, are not to be deemed within the scope of the business. Irwin *v.* Williar, 110 U. S. 499.

The authority of partners to bind each other is not fixed by the articles of copartnership, but by the character of their dealings, and the manner in which they hold themselves out to the world. Catlin *v.* Gilders, 3 Ala. 536.

It is proper to show the general business of a firm as bearing upon the question whether certain acts of one partner bind them. Saltmarsh *v.* Bower, 34 Ala. 613.

Thus, a farming partnership confers no authority on one partner to carry on in the firm name a store for the sale of merchandise. Humes *v.* O'Bryan, 74 Ala. 64.

In law partnerships either partner may attend to business intrusted to the firm. But if a firm contract with a client for the personal services of a particular partner, and he fails to perform them, it is a breach of contract; yet the damages for such breach will be but nominal, if another party shall perform the duty with due professional skill, and without injury to the client. Smith *v.* Hill, 13 Ark. 173.

A copartnership formed to transport passengers and their baggage, by a line of stages, does not, from the mere nature of the business, authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance in a specified time. Walcott *v.* Carfield, 3 Conn. 194.

A declaration alleged, in brief, as follows: The defendants, as partners, were engaged in the sale of drugs and medicines in the city of Macon, and were indebted to plaintiff in the sum of $130.12, with interest. The plaintiff was employed by them as a clerk, and while so employed, he was the owner of a formula for "Russel's Axle Grease." After making and selling this preparation for some time, one of the members of the firm voluntarily told him that he would allow him a liberal royalty on the sale of the preparation, whereupon he compounded and sold it solely for the defendants, giving them all the profits. The plaintiff sold a quantity stated. The agreement fixed no amount as the plaintiff's royalty. He was reasonably entitled to half the net profits. *Held*, no cause of action; the only liability, if any, being that of an individual member of the firm, based on a promise without valuable consideration. There was nothing on which an amendment could be founded. Lamar *v.* Russel (Ga.), 2 S. E. Rep. 467.

Where one deals with a partner in a matter not within the scope of the firm business, the law presumes that he deals with him in his individual capacity. Davis *v.* Blackwell, 5 Bradw. (Ill.) 32.

Partners in the practice of medicine are not jointly liable for the expenditures of each other having no connection with their partnership business as physicians. Thompson *v.* Howard, 2 Ind. 245.

In order to establish that a commercial partnership is not bound by the act of one of the partners, in any particular matter, it is necessary expressly to deny his authority and to disclose, by evidence,

the power of one partner to bind his firm in particular cases where there is no question of tort or fraud. For the sake of convenience, subjects noticed will be arranged in alphabetical order.

1. *Accounts.*—An account rendered by one partner relative to a

the nature of their commercial business. Vienne *v.* Harris, 14 La. Ann. 382.

Ordinary partners are not bound *in solido* for attorney's fees for services rendered the firm under the employment by one of its members. In such a case each one of the partners is bound for his share, if no agreement has been made between the attorney and the partner who employed him. Hyams *v.* Rogers, 24 La. Ann. 230.

A partner is not liable for bonds received without his knowledge by his copartner on special deposit, where the receiving of special deposits is no part of the business of the firm. Hatheway's Appeal, 52 Mich. 112.

One who deals with a partner in matters outside the business of the firm can acquire no claim against the partnership, unless he can prove a previous authority for, or a subsequent ratification of the partner's act; and this cannot be implied from the mere fact of partnership. Selden *v.* Bank of Commerce, 3 Minn. 166.

A knowledge of third persons of the limited nature of the partnership will be inferred from circumstances. Livingston *v.* Roosevelt, 4 Johns. (N. Y.) 251.

Partnership in a patent right, as for the navigation of steam vessels, does not authorize one partner to bind the partnership for building steamboats, this not being strictly connected with the enjoyment of their joint privileges. Lawrence *v.* Dale, 3 Johns. (N. Y.) Ch. 23.

An assignment by one of two partners, in the partnership name, confers no title, unless it clearly appear that the assignment relates to a matter within the scope of the partnership business. Hudson *v.* McKenzie, 1 E. D. Smith (N. Y.) 358.

Either partner can bind himself by using the firm name in an affair having no connection with its business, but the liability extends no further as long as the party dealing with him understood him to be so using the firm name. Merchant *v.* Belding, 49 How. (N. Y.) Pr. 344.

One partner cannot bind his copartner by any contract, unless it is in some way connected with the partnership business, or unless the act be adopted and recognized by the copartner, or unless it be a bill or endorsement of a note, which the party taking it had good reason to believe was authorized by the firm. Long *v.* Carter, 3 Ired. (N. C.) L. 238.

One partner cannot make himself the agent of his firm to subscribe stock to a railroad company, the building of railroads not being within the scope of the partnership. Livingston *v.* Pittsburg, &c., R. R. Co., 2 Grant (Pa.) Cas. 219.

Each member of an unincorporated business association, in law a partnership, may bind his copartners for debts contracted within the scope of the legitimate business of the association; otherwise, as to debts for purposes foreign to its objects; as to such, a partner can be held liable only upon his assent or ratification. Thompson's Estate, 12 Phil. (Pa.) 36.

A partnership to effect a special end binds the members for each other's acts only in the prosecution of that end, unless an authority may be implied from the method of transacting business. Town *v.* Hendee, 27 Vt. 258.

partnership transaction is equivalent to an account rendered by the firm. (*k*) [5]

The power of one partner to settle accounts, and to assent to a transfer of them, will be found noticed *infra* under the head "*Debts.*"

2. *Admissions.*—The admissions of one partner, with reference to a partnership transaction, are evidence against the firm; (*l*) but are not necessarily conclusive. (*m*) An admission by one person, who afterwards enters into partnership with others, is no evidence against them, merely because they and he are partners when the evidence is sought to be used. (*n*) Moreover, in an action against partners, the answer of one of *them to interrogatories cannot be read against the others, (*o*) unless they have an opportunity of contradicting it. [6] [*129

(*k*) Fergusson *v.* Fyffe, 8 Cl. & F. 121, where an account sent by one partner showing a balance due from the firm, and bearing interest at nine per cent., was held to be binding on the firm. See, as to false accounts, *infra*, section 3.

5. Accounts.—In an action against A as the dormant partner of B, accounts rendered by B to A, and retained by A without objection, are admissible in evidence to show the nature of the connection between them. Corps *v.* Robinson, 2 Wash. (U. S.) 388. But an account in the handwriting of the ostensible partner, not shown to have existed while the partnership existed, is not competent evidence, in a suit against an alleged secret partner, to show to what the business extended. Oakley *v.* Aspinwall, 2 Sandf. (N. Y.) 7.

The execution of a certificate of deposit by a partner in the firm name, on an account not pertaining to the business of the firm, and with the depositor's knowledge, does not bind the firm. Rutledge *v.* Squires, 23 Iowa 53.

Under a stipulation, in the articles, that one partner should make up and state the partnership accounts at regular periods, it was held that unless the other partner objected to the statements of accounts thus made within a reasonable time, he must be considered as having acquiesced in their correctness. Heartt *v.* Corning, 3 Paige (N. Y.) 566.

(*l*) Wood *v.* Braddick, 1 Taunt. 104; Pritchard *v.* Draper, 1 Ry. & M. 191; affirmed, 2 Cl. & F. 379; Nicholls *v.* Dowling, 1 Stark. 81; Sangster *v.* Mazarredo, Id. 162; Thwaites *v* Richardson, 1 Peake 23; Grant *v.* Jackson, Id. 268; Wright *v.* Court, 2 Car. & P. 232; and see the last preceding note, and *ante* p. *87. As to part owners, see Jaggers *v.* Binnings, 1 Stark. 64.

(*m*) Wickham *v.* Wickham, 2 Kay & J. 491, where the point in question was the amount of a debt.

(*n*) Tunley *v.* Evans, 2 Dowl. & L. 747; Catt *v.* Howard, 3 Stark. 3.

(*o*) Parker *v.* Morrell, 2 Ph. 453; Dale *v.* Hamilton, 5 Hare 393.

6. Admissions: when admissible, generally.—As a general rule, subject to the exceptions hereinafter noted, the admissions or declarations of one partner as to firm transactions, against the interest of the firm, are admissible to bind his copartners. In such cases the admission may be received in evidence, although the suit may not be in the name of the firm. Fisk *v.* Copeland, 1 Overt. (Tenn.) 383.

See further, *infra*, under the heads "*Debts*" and "*Representations.*"

3. *Agents.*—As to the appointment of agents, see *infra*, under the head "*Servants.*" [7]

Where one partner gives a note for money borrowed for the firm and on its credit, this is a partnership debt, and a written admission by the other partner that the money was used for the purposes of the firm is competent evidence of the fact in a suit between firm creditors. Anderson *v.* Norton, 15 Lea (Tenn.) 14. So, also, the answer of one partner, admitting the indebtedness of the partnership, is sufficient to charge the partnership as garnishees. Anderson *v.* Wanzer, 5 How. (Miss.) 587. The admissions of a partner do not cease to be evidence in an action against the firm because a *nolle prosequi* has been entered as against him. Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498.

In an action to recover the balance of a partnership account, the accounts current rendered by each of the partners to the others are admissible to show, by the admissions of the parties, that the items of such accounts are not items of partnership account. Barry *v.* Barry, 3 Cranch (U. S.) C. C. 120.

Where two mercantile houses do business under their respective names, but the same partners compose both firms, the acknowledgment of one is *prima facie* evidence against the other. Sneed *v.* Kelly, 3 Dana (Ky.) 538.

— when inadmissible.— Where the authority of the partner making the admissions to speak for his associates is not shown, his statements, so far as concerns them, are mere hearsay. Heffron *v.* Hanaford, 40 Mich. 305. And, in any case, he can only bind his associates by his admissions within the scope of the business of the firm. Ib.

Admissions of a partner, made during the partnership, may be introduced as evidence against him in favor of creditors of the firm, but not as evidence against the creditors of the partnership, for the purpose of diverting the firm assets to the payment of his individual debts. Bond *v.* Nave, 62 Ind. 506.

Illustrations.—*The following admissions have been held admissible:* The acknowledgment of service of a writ, written by one partner in the presence of the other,

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7. Agents.—One partner may legally authorize a clerk of the firm to accept bills, and sign and endorse notes, in the name of the company. Tillier *v.* Whitehead, 1 Dall. (U. S.) 269.

One partner may appoint an agent, by parol, to make and endorse bills, &c.; and such power is not void, though given by him by writing under seal. Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 280.

Any partner in a firm may be the agent of a third person, in drawing bills in favor of the firm, for advances made to such third person, under an express authority. Baring *v.* Lyman, 1 Story (U. S.) 396.

The employment of counsel to litigate the title to the mine does not come within the limited powers vested in a mining partner. But this rule does not apply to incorporated mining associations, nor to partnerships formed under Colorado statutes. Charles *v.* Eshleman, 5 Colo. 107.

Where one member of a law partnership obtained possession of a letter containing an authority to take care of the writer's interests, directed to the other partner, and acted under the instructions contained in the letter—*Held*, that the writer was bound by the act of the partner, as much so as if the other partner had received the letter and acted upon it. Beck *v.* Martin, 2 McMull. (S. C.) 260.

4. *Arbitration.*—One partner cannot, without special authority, bind the firm by a submission to arbitration. (*p*) The power to refer dis-

and with his consent. Freeman *v.* Carhart, 17 Ga. 348. The confession of one member of a copartnership of any fact tending to bind the whole, in a matter of joint concern. Odiorne *v.* Maxcy, 15 Mass. 39. Entries made by one partner, during the continuance of the partnership, in a book of accounts. Walden *v.* Sherburne, 15 Johns. (N. Y.) 409.

Contra as to a declaration of a partner that a liability incurred by a third person, at his request, in borrowing a sum of money, was for the benefit of the firm. Thorn *v.* Smith, 21 Wend. (N. Y.) 365.

Partnership relation not provable by admissions.—The admission of one partner is not sufficient to prove the existence of the copartnership as against the other partner. Corps *v.* Robinson, 2 Wash. (U. S.) 388; Evans *v.* Corriell, 1 Gr. (Iowa) 25; Lea *v.* Guice, 13 Smed. & M. (Miss.) 656. The partnership must first be proved *aliunde.* McFadgen *v.* Harrington, 67 N. C. 29; Nixon *v.* Downey, 42 Iowa 78; Alcott *v.* Strong, 9 Cush. (Mass.) 323. See, also, McLellan *v.* Pennell, 52 Me. 402.

Where a partnership is alleged to exist between two persons, the acts and declarations of either bind him, but do not affect the other, and it often becomes necessary to prove the acts and declarations of one at a time, and therefore such testimony may properly be admitted, and the legal effect of it postponed until the judge instructs the jury upon the law of the whole case, whose duty it would be to inform them that the acts and declarations of a party, before the partnership is proved, bind himself only. Jennings *v.* Estes, 16 Me. 323.

But after the fact of partnership is proved by other evidence, the admissions of one partner may be received to charge the partnership in relation to transactions during its existence. Phillips *v.* Purington, 15 Me. 425; Gulick *v.* Gulick, 2 Gr. (N. J.) 578; Goodenough *v.* Duffield, Wright (Ohio) 455; Wolle *v.* Brown, 4 Whart. (Pa.) 365; Allen *v.* Owens, 2 Spears (S. C.) 170. Thus, in an action against partners jointly, an answer in chancery of one of them may be given in evidence by the plaintiff, after the partnership has been proved, to show admissions of the plaintiff's demand, and, in such case, evidence to discredit the answer cannot be offered by the other members of the copartnership. Hutchins *v.* Childress, 4 Stew. & P. (Ala.) 34.

Admissions after dissolution.—Partnership transactions with third persons, which took place after the sale of his present interest by one partner to another and after the retiring partner had ceased to be a member of the firm, are not admissible against him upon the question of the value of his interest when sold, nor upon the question of fraud or mistake in the contract of sale, and equally inadmissible are judgments rendered against the new firm, to which the retired member was no party. Dortie *v.* Dugas, 55 Ga. 484.

In *assumpsit* by partners, for work and labor, statements of one of them, made after dissolution, so far as they tend to show a new contract destroying the partnership claim and giving to each partner a separate demand for his part of the debt, are not admissible; but his statements, so far as they show a payment

(*p*) See Stead *v.* Salt, 2 Bing. 101; Antram *v.* Chace, 15 East 209. Adams *v.* Bankhart, 1 Cr., M. & R. 681;

putes, even although they relate to dealings with the firm, cannot be said to be necessary for carrying on its business in the ordinary way. (*q*)

made to himself, may be proved. Lefavour *v.* Yandes, 2 Blackf. (Ind.) 240.

The admissions of one partner, made at the time of the payment to him of a debt due to the partners, and at a time subsequently to a dissolution, are admissible against the other partners, as the admissions of an agent relative to an act within the scope of his authority, made at the time when such act was done, are admissible in evidence to bind his principal. Kirk *v.* Hiatt, 2 Ind. 322.

The admissions or declarations of one partner, after dissolution and not under a new authority, are not evidence against a former partner. Craig *v.* Alverson, 6 J. J. Marsh. (Ky.) 509; Crumless *v.* Sturgess, 6 Heisk. (Tenn.) 190; Dougelot *v.* Rawlings, 58 Mo. 75; Tick *v.* Mulholland, 48 Wis. 419.

One partner can interrupt prescription as to all the other partners who are bound *in solido*, even after the dissolution of the partnership. Carroll *v.* Gayarré, 15 La. Ann. 671.

A and B were partners in trade, and upon their dissolution B assigned, for value, all his interest in the partnership effects to A. *Held*, that B could not, by his mere declaration, made after such assignment, defeat an action brought in their joint names. Owings *v.* Low, 5 Gill & J. (Md.) 134.

After dissolution of partnership between an active and a dormant partner, an action for the balance of an account was brought against both, in which the dormant partner pleaded payment, and the active partner was defaulted. *Held*, that an admission made after the dissolution by the active parter, that such balance, in consequence of a mistake, had not been paid, was competent evidence. Bridge *v.* Gray, 14 Pick. (Mass.) 55.

In Pennsylvania, under the statute of 1838, authorizing one firm to maintain an action against another, both having a common partner, the acts and declarations of such common partner, after dissolution of such partnership, are admissible in evidence. Tassey *v.* Church, 4 Watts & S. (Pa.) 141.

Admissions of deceased partner.—In an action against a surviving partner for fraud and deceit in the purchase of a slave, the declarations of the deceased partner, by whom the contract was made, before and after the purchase, as to his object in purchasing, are not admissible for defendant to show that his copartner made the purchase on his own individual account, and not on account of the firm. Dixon *v.* Barclay, 22 Ala. 370.

Where surviving partners are sued on a note given by the deceased partner in his individual name, his declarations that the note was given for the partnership business, and was a company note, are not admissible in the absence of evidence *aliunde* that those transactions out of which the note arose were for the partnership. Ostrom *v.* Jacobs, 9 Metc. (Mass.) 454. Such declarations are admissible against the survivor, where the partnership is admitted. Doremus *v.* McCormick, 7 Gill (Md.) 49. In an action against the surviving partner, for money lent to the deceased partner, the defence was that the money was not borrowed or used for firm purposes. *Held*, that declarations of the deceased partner to third persons, made after the money was borrowed, to the effect

(*q*) Stead *v.* Salt, 3 Bing. 101; Adams *v.* Bankhart, 1 Cr., M. & R. 681; and see Boyd *v.* Emerson, 2 Ad. & E. 184.

Where a partnership has been dissolved and it has been agreed that one of the partners shall get in the debts due to the firm, he has no power, after bringing an action in the name of the firm for a debt due to it, to bind his copartner by a reference of all matters in difference

that it was borrowed and used for firm purposes, were admissible. Klock *v.* Beckman, 18 Hun (N. Y.) 502.

Admissions of surviving partner.—If the admissions of a surviving partner with respect to a transaction within the scope of the copartnership, made after the death of his copartner, are competent evidence against the personal representatives of the deceased partner, they are not conclusive. McElroy *v.* Ludlam, 5 Stew. (N. J.) 828.

Admissions of dormant partner.—Declarations of a dormant partner are admissible in evidence against his copartners, if they relate to the partnership business. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. (1 Gilm.) 15.

Declarations in favor of firm or partner making them.—The acts, declarations or admissions of one of two partners are not admissible as evidence for them, in an action against them as a firm, and where they have jointly pleaded the general issue. Hutchins *v.* Childress, 4 Stew. & P. (Ala.) 34. So, also, the "admission" of one partner that his copartner was indebted to him cannot bind such copartner, in a suit by a person claiming through the former. A claim cannot be allowed so to prove itself under the name of an admission. Lewis *v.* Allen, 17 Ga. 300. The rule is that the declarations of the alleged partners, unaccompanied by acts, and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor. Phillips *v.* Purington, 15 Me. 425. Thus, in a suit against A and B as partners, declarations of A that B was not his partner cannot be introduced as evidence to exonerate B. Young *v.* Smith, 25 Mo. 341.

Admission must have been relied on.—Where the vendor of goods, at the time of the sale, professes to sell them to the vendee in his individual capacity, he cannot, in an action against a firm of which the vendee was a member, give in evidence the declarations or admissions of such vendee that the goods were purchased for the benefit of the firm. Lararus *v.* Long, 3 Ired. (N. C.) L. 39.

Instances of admissions received in evidence.—A, being indebted to a firm on a note, paid a portion of it to B, one of the partners, who promised to endorse it on the note, but did not do so. After the dissolution of the partnership, C, the other partner, gave a writing, signed by his individual name, acknowledging that he had retained in his hands the money of A, to the amount due on the note, and promising to refund to A such sum, as, in a suit then pending on the note, the court should find had been paid thereon. The money so retained had been received by C, as a member of the partnership, and for their use and benefit. The suit was then withdrawn, and A brought his action against B and C jointly, to recover back the amount first paid to B. *Held*, that the writing given by C to A was admissible in evidence. Story *v.* Barrell, 2 Conn. 665.

Where a *chose in action* against a partnership was assigned, and one of the partners, being called upon for payment by the assignee, said he would pay to him if he was legally entitled to receive it—*Held*, that it was sufficient to enable the assignee to maintain an action in his own

between the plaintiffs and the defendant. (*r*) The partner actually referring the dispute is, however, himself bound by the award, (*s*) and the other partners may become bound by ratification. (*t*) [8]

name against all the partners, on showing a legal assignment. Lang *v.* Fiske, 11 Me. 385.

Where one of two partners had assigned his interest in the partnership property to his copartner as collateral security for a debt which he owed him, but was still liable for the debts of the firm, and entitled to his proportion of the surplus property after the debts of the firm and his debt to his partner were paid—*Held*, that a paper signed by the partner who had assigned his interest, and made after the commencement of the suit, stating that after the assignment he had taken the money of the firm, to recover which the action was brought, and had appropriated it to the payment of the note of another firm of which he was a member, in the hands of the defendant, was admissible in evidence against the firm, in an action of *assumpsit* for money had and received, brought for the benefit of the assignee alone. Foster *v.* Fifield, 29 Me. 136.

Instances of admissions rejected as evidence.—An acknowledgment of service of process, on a writ against a partnership, by one of the partners, signed "T. S. C., one of the firm of C. & L.," is not an acknowledgment in behalf of his copartners. Clark *v.* Stoddard, 3 Ala. 366.

A entered into partnership with B in the business of tanning, and C bound himself, in a covenant to B, for A's conduct as a partner for a certain time. *Held*, that in an action by B against C on the covenant, the admissions of A, made after the expiration of the stipulated time, were not admissible as evidence against C. Hotchkiss *v.* Lyon, 2 Blackf. (Ind.) 222.

A, being in partnership with B, collected a sum of money in his individual capacity for C, and afterwards executed to the latter a note in the name of the firm for the amount. In a suit against the firm on the note, the plaintiff offered to prove that A, during the existence of the firm, had declared that said money had been used by himself and partner in the business of the partnership. *Held*, that the evidence was inadmissible. Hickman *v.* Reineking, 6 Blackf. (Ind.) 388.

(*r*) Hatton *v.* Royle, 3 Hurlst. & N. 500.

(*s*) Strangford *v.* Green, 2 Mod. 228.

(*t*) As in Thomas *v.* Atherton, 10 Ch. D. 185.

8. **Arbitration.**—The weight of authority is to the effect that one partner cannot, while the partnership continues, bind another to a submission of the interests of both to arbitration. Carthaus *v.* Ferrers, 1 Pet. (U. S.) 222; Jones *v.* Bailey, 5 Cal. 345; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Buchoz *v.* Grandjean, 1 Mich. 367; Martin *v.* Thrasher, 40 Vt. 460. But he can bind *himself* to the extent of his interest in the firm. Carthaus *v.* Ferrers, *supra;* Fanchon *v.* Bibb Furnace Co. (Ala.), 2 So. Rep. 268; Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412; Brink *v.* New Amsterdam, &c., Ins. Co., 5 Robt. (N. Y.) 104.

But where the other parties previously assent to or subsequently ratify such submission, it will bind them. Davis *v.* Berger, 54 Mich. 652, and cases last cited above.

In some states, however, if the submission by one partner be not under seal, it will bind the other partners. Hallack *v.* March, 25 Ill. 48; Southard *v.* Steele, 3

5. *Banking account.*—One partner has no implied authority to bind the firm by opening a banking account on its behalf in his own name. (*u*) See *infra*, "*Cheques.*"

T. B. Mon. (Ky.) 435; Taylor *v.* Congell 12 Smed. & M. (Miss.) 243; Taylor *v.* Coryell, 12 Serg. & R. (Pa.) 243; Gay *v.* Waltman, 89 Pa. St. 453. See, also, Armstrong *v.* Robinson, 5 Gill & J. (Md.) 412.

That a sale of his interest by one partner to the other, authorizes the latter to submit the firm claims to arbitration, see Becker *v.* Boon, 61 N. Y. 317.

Where one partner signed a sealed submission to an award, and accepted the amount awarded in favor of the partnership, pursuant to such submission, and endorsed a receipt in full on the award—*Held*, that it operated either as a release by one partner, or as an award and satisfaction, and was sufficient to bar the partnership claim, though the submission might not have been binding upon his copartner. Buchanan *v.* Curry, 19 Johns. (N. Y.) 137.

Mr. Gow, in his Treatise on Partnership (supplement, London, 1841, c. 2, § 2, p. 17), in reviewing the English cases on this subject, says: "In the case of Boyd *v.* Emerson, 2 Ad. & E. 184, one question was whether a partner could bind his copartners by a parol submission to arbitration. But the case being disposed of on other points, it became unnecessary to decide that question. However, Sir F. Pollock, who had to maintain the affirmative, in the course of his argument observed that the point might be considered as *res integra*, and admitted that 'one partner cannot bind another in a matter of arbitration, where the submission is by deed; because, in general, he cannot bind his partner by any deed.' Harrison *v.* Jackson, 7 T. R. 207. But it does not follow that one of several persons, who are general partners, cannot in any way bind the rest by a submission to arbitration upon a specific matter of partnership right. One partner may bring or settle an action on behalf of the rest. Furnival *v.* Weston, 7 J. B. Moore 356; Harwood *v.* Edwards, Gow on Part. (3d ed.) 65, note g. Why may he not enter into an agreement to refer the subject matter? And if so, why may not one agree, on behalf of the rest, to be governed by an opinion in which both they and the opposite party may confide? In Strangford *v.* Green, 2 Mod. 228, the submission appears to have been by arbitration bond, and therefore the partner could not be bound. In Stead *v.* Salt, 3 Bing. 101, the parties were not partners generally, but only in the dealings to which the award related; the matter was twice referred. In the first instance four partners signed the agreement of reference; the arbitration went off, and the new agreement was signed by three only. In the absence of any explanation, it was reasonable to suppose that if both agreements were signed by the authority of all the partners the second would have been executed by the same number as the first. The passage cited in that case, from Com. Dig., 'Arbitrament,' D 2, from which it was implied that a partner cannot bind his copartner, probably refers to submissions by deed. There is no ground in reason for saying that in the case of a general partnership in a banking firm, one partner cannot submit, on behalf of all, to such a mode of settling a dispute upon a partnership concern as

(*u*) Alliance Bank, Limited, *v.* Kearsley, L. R., 6 C. P. 433.

[5a. *Assignments for benefit of creditors.*9]

6. *Bills of exchange and promissory notes.*—Every member of an ordinary trading partnership has implied power to bind the firm by

was adopted here. Suppose the question had been a practical one, as to something to be done in the course of business, might not a partner have agreed to take the judgment of an experienced person, as a custom-house officer, a dock-master, or an eminent merchant? And if so, why not the opinion of counsel in the present case? To hold that the opinion could not be so taken would throw great impediments in the way of a very common, useful, and economical mode of settling such disputes."

9. Assignments for benefit of creditors—when one partner may assign.—It may be safely said that under ordinary circumstances one partner may not, without the assent of the other, assign the firm property to a trustee for the benefit of the creditors; yet if an extraordinary emergency occurs in the affairs of the partnership, and the non-assigning partner cannot be consulted on account of his absence, under circumstances which furnish reasonable ground for inferring that he intended to confer upon the assigning partner authority to do any act for the firm which could be done with his concurrence if he were present, such an assignment, if fairly made, will be presumed *prima facie* to be valid. Stein *v.* La Dow, 13 Minn. 412; Forbes *v.* Scannell, 13 Cal. 242; Robinson *v.* Gregory, 29 Barb. (N. Y.) 560; Palmer *v.* Myers, 43 Id. 509; Deming *v.* Colt, 3 Sandf. (N. Y.) 284; National Bank *v.* Sackett, 2 Abb. (N. Y.) Pr. 286; Adams *v.* Thornton (Ala.), 3 So. Rep. 20.

Where the other partner assents to the making of the assignment by his copartner (Baldwin *v.* Tynes, 19 Abb. (N. Y.) Pr. 32), or is absent or incapable of expressing assent or dissent (Loeb *v.* Pierpoint, 58 Iowa 469; S. C., 43 Am. Rep. 122; Johnson *v.* Robinson (Tex.), 4 S. W. Rep. 625), or has abandoned all control of the business (Kemp *v.* Carnley, 3 Duer (N. Y.) 1), or has sold out his interest to the partner who executes the assignment (Clark *v.* McClelland, 2 Grant (Pa.) Cas. 31), or has absconded (Sullivan *v.* Smith, 15 Neb. 476; S. C., 48 Am. Rep. 354)—in any such case an assignment executed by one partner is ordinarily valid on the ground of necessity, though it may, perhaps, be voidable by his copartner. Sheldon *v.* Smith, 28 Barb. (N. Y.) 593.

So, also, an assignment by a partner of his separate property, in trust for the payment of the partnership debts, is valid as against a separate creditor of such partner. Newman *v.* Bagley, 16 Pick. (Mass.) 570. See, also, Hennessy *v.* Western Bank, (6 Watts & S. (Pa.) 300), where it was held that a general assignment of all the partnership effects for the benefit of creditors, executed by a part only of the firm, and followed by delivery, is valid.

In Anderson *v.* Tompkins (1 Brock. (U. S.) 456), Marshall, C. J., lays down the law as follows: "It will be readily conceded that a fraudulent sale, whether made by deed or otherwise, would pass nothing to a vendee concerned in the fraud. But, with this exception, I feel much difficulty in setting any other limits to the power of a partner in disposing of the effects of the company, purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or of any number of articles. This power certainly would not be exercised in the presence of a partner,

drawing, accepting or endorsing bills of exchange, or by making and endorsing promissory notes in its name and for the purposes of the firm. (*x*) And if two partners, unknown to each other, give two bills

without consulting him; and, if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances. But with respect to the power, in a case perfectly fair, I can perceive no ground on which it is to be questioned. But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that which is actually done every day, or is it that which may be done whenever the occasion for doing it presents itself? There are small traders who scarcely ever, in practice, sell a piece of cloth uncut, or a cask of spirits. But may not a partner in such a store sell a piece of cloth, or a cask of spirits? His power extends to the sale of the article, and the course of trade does not limit him as to quantity. So with respect to larger concerns. By the course of trade is understood dealing in an article in which the company is accustomed to deal; and dealing in that article for the company. Tompkins & Murray sold goods. A sale of goods was in the course of their trade, and within the power of either partner. A fair sale, then, of all or of a part of the goods was within the power vested in a partner. This reasoning applies with increased force when we consider the situation of these partners. The one was on a voyage to Europe, the other in possession of all the partnership effects for sale. The absent partner could have no agency in the sale of them. He could not be consulted. He could not give an opinion. In leaving the country he must have intended to confide all his business to the partner who remained for the purpose of transacting it. Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The *quantum* of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power that these goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power. This is denominated a destruction of the partnership subject, and a dissolution of the partnership. But how is it a destruction of the subject? Can this appellation be bestowed on the application of the joint property to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership is an association to carry on business jointly.

(*x*) See Re Riches, 4 De G., J. & S. 581. and 5 N. R. 287; Pinckney *v.* Hall, 1 Salk. 126; Dickinson *v.* Valpy, 10 Barn. & C. 128; Sutton *v.* Gregory, 2 Peake 150; Smith *v.* Baily, 11 Mod. 401; Lewis *v.* Reilly, 1 Q. B. 349; Stephens *v.* Reynolds, 5 Hurlst. & N. 513. See, also, The Bills of Ex. Act, 1882, § 23, cl. 2.

*130] in the name of the firm in payment *of the same demand, the firm will be liable on both bills if held by *bona fide* holders for value without notice of the mistake. (*y*) [10]

This association may be formed for the future before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner had a right to dissolve this partnership. The act, however, of applying the means of carrying on their business to the payment of their debts, might suspend

(*y*) Davison *v.* Robertson, 3 Dow 218.

10. **Power of one partner to execute bills and notes.**—The law implies an authority in one of several partners to execute promissory notes in the name of the firm: (1) where such authority is necessary to the successful carrying on of the business of the firm; or (2) according to the usage of similar partnerships; or (3) according to the course of trade of that particular partnership. Gray *v.* Ward, 18 Ill. 32; Storer *v.* Hinkley, Kirby (Conn.) 147; Newell *v.* Smith, 23 Ga. 170; Dow *v.* Phillips, 24 Ill. 249; Miller *v.* Hughes, 1 A. K. Marsh. (Ky.) 181; Waldo Bank *v.* Lumbert, 16 Me. 416; Coursey *v.* Baker, 7 Harr. & J. (Md.) 28; Bascom *v.* Young, 7 Mo. 1; Potter *v.* Dillon, Id. 228; Partin *v.* Leiterloh, 6 Jones (N. C.) Eq. 341; Kirkpatrick *v.* Turnbull, Add. (Pa.) 259. Each partner is the agent of the other for this purpose, but not to sign the firm name to notes relating to business outside of the scope of the partnership. Zuel *v.* Bowen, 78 Ill. 234; Wagnor *v.* Clay, 1 A. K. Marsh. (Ky.) 257; Blodgett *v.* Weed, 119 Mass. 215; Nat. Union Bank *v.* London, 66 Barb. (N. Y.) 189; Ditts *v.* Lonsdale, 49 Ind. 521. The implied power exists only where the usual course of the business would appear to require it. Bradley *v.* Linn, 19 Ill. App. 322. See, however, 3 Kent Com. 42, where it is said that "even if the paper was made in a case which was not in its nature a partnership transaction, yet it will bind the firm if it was done in the name of the firm and there be evidence that it was done under its express or implied sanction."

In all such cases the burden of proof is on the firm in the first instance, the legal presumption being that the note was given for a partnership indebtedness in the regular course of business, until the contrary be shown. Thurston *v.* Lloyd, 4 Md. 283; Knapp *v.* McBride, 7 Ala. 19; Barrett *v.* Swann, 17 Me. 180; Eusminger *v.* Marvin, 5 Blackf. (Ind.) 210; Littell *v.* Fitch, 11 Mich. 525; Hogg *v.* Orgill, 34 Pa. St. 344; Miller *v.* Hines, 15 Ga. 197; Gregg *v.* Fisher, 3 Ill. App. 261; Adams *v.* Ruggles, 17 Kan. 237; Magill *v.* Merrie, 5 B. Mon. (Ky.) 168; Hamilton *v.* Somers, 12 Id. 11; Waldo Bank *v.* Greeley, 16 Me. 419; Carrier *v.* Cameron, 31 Mich. 373; Laler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 Id. 81; Davis *v.* Cook, 14 Nev. 265; Whittaker *v.* Brown, 16 Wend. (N. Y.) 505; National Union Bank *v.* London, 66 Barb. (N. Y.) 189.

Such a note, even though given without the knowledge or consent of the other partner, and for a debt unconnected with the partnership business, will bind the firm in the hands of an innocent endorsee for value. Duncan *v.* Clark, 2 Rich. (S. C.) 587; Haldeman *v.* Bank of Middletown, 28 Pa. St. 440; Collier *v.* Cross, 20 Ga. 1; Rich *v.* Davis, 4 Cal. 22; S. C., 6 Cal. 141; Hawes *v.* Dunton, 1 Bailey (S. C.) 146; Marsh *v.* Thompson National Bank, 2 Ill. App. 217; Walworth *v.* Henderson, 9 La. Ann. 339; Boardman *v.* Gore, 15 Mass. 331; First National Bank *v.* Morgan, 73 N. Y. 593; Roth *v.* Colvin, 32 Vt. 125.

In applying the foregoing principles

Acceptances in blank.—One partner, however, has no implied power to accept bills in blank, nor to bind his copartners, otherwise than

the operations of the company, but did not dissolve the contract under which their operations were to be conducted."

When one may not assign.—There is nothing in what is said above which militates against the well-settled rule that an assignment of all the property of a firm, for the benefit of creditors, made by

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it has been held that although the acceptance of a security of a higher dignity merges and extinguishes the original cause of action; yet, if one partner, who has executed, in the name of the firm, a single bill, for the amount of a debt which the firm owes, afterwards gives a promissory note in the name of the firm, a recovery may be had thereon against the firm. The partnership debt, which was extinguished by the acceptance of the single bill, is thereby revived. Davidson *v.* Kelly, 1 Md. 492.

So, if one copartner make a negotiable note in the name of the firm, and forge upon it the name of another person as endorser, a *bona fide* holder of the note, who has paid a valuable consideration for it, may maintain an action against all the partners to recover the amount of the note, although it was made without their knowledge and there be no evidence that they derived any benefit from it. Boardman *v.* Gore, 15 Mass. 331.

And if one member of a partnership sign a note representing a partnership debt, all the other partners are, as between themselves, under the same obligation to pay the note as the signer. Consequently, a payment of the note by a partner other than the signer, although from his private funds, extinguishes the note; nor will it be revived by a bare promise made by the signer to the partner who paid the note to pay the same. Sprague *v.* Ainsworth, 40 Vt. 47.

Power of one partner to draw or accept bills.—One partner has the same power to draw bills and accept them (except in blank) that he possesses to make notes which will bind the firm, the form of the paper not changing the principles examined above. Thus, one copartner may bind the firm by a bill of exchange drawn by him in his own name upon the firm for a partnership debt. Dougal *v.* Cowles, 5 Day (Conn.) 511. But to support an action against two as acceptors of a draft in their partnership name, the plaintiff must prove the partnership, and that one, at least, of the defendants accepted the draft. Head *v.* Sleeper, 20 Me. 314.

The act of drawing a bill by one partner, in his own name, on the firm of which he is a member, for the use of the partnership, is, in law, an acceptance by the drawer in behalf of the firm, and an action may be maintained against the firm as on an accepted bill. Dougal *v.* Cowles, *supra.*

An individual acceptance of an order on two firms to pay what might be in their hands, or in the hands of any partner, by a partner of both intrusted with the settlement of all accounts with the drawer, is presumed to be upon consideration of having the funds under his control, and is therefore valid. Prentiss *v.* Foster, 28 Vt. 742.

But an acceptance of an order by one member of a firm will not bind the company where there is no allegation that the defendants were partners, unless the partnership be proved. Meachem *v.* Batchelder, 3 Chand. (Wis.) 316.

So, also, it is no part of the business of mercantile partnerships to draw or accept

jointly with himself. A bill accepted in blank by one partner in the name of the firm is not binding on it except in favor of a *bona fide*

some of the partners without the consent of the others, is void, not only as to the other partners, but as to creditors. Pettee *v.* Orser, 18 How. (N. Y.) Pr. 442; Hook *v.* Stone, 34 Mo. 329; Hughes *v.* Ellison, 5 Mo. 463; Fish *v.* Miller, 5 Paige (N. Y.) 26; Wells *v.* March, 30 N. Y. 344; Coope *v.* Bowles, 42 Barb. (N. Y.) 87;

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bills in order to pay debts of individual partners or as security for third persons, and such acts by one partner in the name of the firm create no obligation against the other members of the firm unless they assent. Tutt *v.* Addams, 24 Mo. 186. But see Freeman *v.* Ross, 15 Ga. 252; Flemming *v* Prescott, 3 Rich. (S. C.) 307.

In Louisiana one partner cannot bind the other by a draft; but where the action is not on the draft only, and the advances for which it was given are shown to have been for the partnership, such other partner will be bound for his share of the advances, though not for any portion of the damages on the protested bill. Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

Power of one partner to endorse bills and notes.—So, also, a partner may endorse a note in the name of his firm, and it may be declared on as the endorsement of the firm. Manhattan Co. *v.* Ledyard, 1 Cai. (N. Y.) 191; Commercial Bank *v.* Lewis, 21 Miss. 226; State, &c., Bank *v.* Thompson, 42 N. H. 369. The same presumption of regularity and authority attaches as in the case of the making of a bill or note by one partner (see *supra*, in this note). Manning *v.* Hayes, 6 Md. 5.

Each partner has the same right to raise money for the use of the firm by endorsement of negotiable paper, as to do so by means of paper already issued. Moorehead *v.* Gilmore, 77 Pa. St. 118. See, also, Manhattan Co. *v.* Ledyard, *supra*.

If one of the partners has been in the habit of endorsing the name of the firm on bills of exchange, it is a fact from which the jury may legally infer that he had authority from the other partners so to do. Bank of Kentucky *v.* Brooking, 2 Litt. (Ky.) 41.

But one partner is not an agent for his copartner, to endorse other than partnership paper. Bowman *v.* Cecil Bank, 3 Grant (Pa.) Cas. 33. Nor can he, without the consent of the other, endorse a note for the benefit of a third person, in the partnership name. Such endorsement imposes no liability on the firm. Lang *v.* Waring, 17 Ala. 145; Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60; Laverty *v.* Burr, 1 Wend. (N. Y.) 529.

Power of one partner to endorse for accommodation.—Where one partner endorses a note in the name of the firm for the accommodation of a third person, without express authority from his copartners, they will not be bound thereby as against the partner endorsing the note, and the latter having paid the note, a judgment on it, recovered by an innocent holder against all the members of the firm, is not evidence to charge such copartners with contribution. Berryhill *v.* McKee, 1 Humph. (Tenn.) 31.

Even though it appears that each one of a firm has, with the assent of the other members, repeatedly endorsed accommodation notes in the firm name, this is no evidence that either member was authorized to sign as maker and surety. Early *v.* Reed, 6 Hill (N. Y.) 12.

Still, a *bona fide* holder, without notice, of an accommodation note, endorsed with the name of a firm by one of the mem-

holder for value without notice of the way in which the bill was accepted. (*z*)

Joint and several notes.—A joint and several promissory note signed by one partner for himself and copartners does not bind them sev-

18 Abb. (N. Y.) Pr. 442; Palmer *v.* Myers, 29 How. (N. Y.) Pr. 8; Kimball *v.* Hamilton Fire Ins. Co., 8 Bosw. (N. Y.) 495; Pettee *v.* Orser, 6 Id. 123; Fisher *v.* Murray, 1 E. D. Smith (N. Y.) 341. For there is no implied authority resulting from the nature of the contract of partnership that will authorize one part-

bers, without the assent of the others, may collect it of the firm. Austin *v.* Vandermark, 4 Hill (N. Y.) 259; Maudlin *v.* Branch Bank, 2 Ala. 502; Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 466; Wells *v.* Evans, 20 Id. 251; 22 Id. 324; Bank of St. Albans *v.* Gilliland, 23 Id. 311; Emerson *v.* Harmon, 14 Me. 271; Catskill Bank *v.* State, 15 Id. 364; Gildersleeve *v.* Mahony, 5 Duer (N. Y.) 383; Whaley *v.* Moody, 2 Humph. (Tenn.) 495.

But one who receives a note so endorsed, knowing at the time that the endorsement was not given for a partnership debt or in the partnership business, but was written by one member of the firm, in a matter not relating to the firm's business, but, on the contrary, for the accommodation of another person, cannot recover thereon against the other members of the firm. Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436; Whitmore *v.* Adams, 17 Iowa 567; Elliott *v.* Dudley, 19 Barb. (N. Y.) 326.

Power of one partner to renew bills and notes.—Again, a partnership note continues binding on the firm, although renewed with the signature of one partner only, when no change in the liabilities of the parties is intended. Horsey *v.* Heath, 5 Ohio 358. The renewal by one partner of such a note, after the dissolution of the partnership, is binding upon the copartner if the latter recognized and consented to it. Sanborn *v.* Stark, 31 Fed. Rep. 18. So, a member of a firm may renew a note originally given for money to be applied to his individual uses, but which was signed with the firm name, by his only partner, with the understanding that the loan was made on the credit of the firm. Tilford *v.* Ramsey, 37 Mo. 563. S. P., Wilson *v.* Richards, 28 Minn. 337.

Power of one partner to waive grace, or demand and notice.—A partner may waive grace upon a firm note given by him. Pierce *v.* Jackson, 21 Cal. 636. So, also, he has authority to waive notice of non-payment, or direct any particular mode of dishonor, and such waiver is binding upon the firm if the holder did not know that it was fraudulently done; and it makes no difference that the note in suit was not running at the time of the waiver. But a partner has no right, as against his copartners, to waive notice upon a note endorsed by him for his own benefit. Windham County Bank *v.* Kendall, 7 R. I. 77. And a settling partner, after dissolution of the partnership and publication of notice thereof, has power to waive demand and notice of a note endorsed by the firm during its existence, and all the partners are bound thereby. Seldner *v.* Mount Jackson Nat. Bank (Md.), 8 Atl. Rep. 262. Where a note is endorsed by a partnership in the partnership name, an agreement by one of the partners to receive notice at a particular place is binding upon his copartners. Nutt *v.* Hunt, 4 Smed. & M. (Miss.) 702.

(*z*) Hogarth *v.* Latham, L. R., 3 Q. B. D. 643.

erally; (*a*) but it does bind them and him jointly (*b*) and himself separately. (*c*)

ner to make a general assignment of the partnership effects, without the knowledge or consent of his copartner. Kirby *v.* Ingersoll, Harr. (Mich.) Ch. 172; S. C., 1 Dougl. 477; Wetter *v.* Schlieper, 4 E. D. Smith (N. Y.) 707; Kelly *v.* Baker, 2 Hilt. (N. Y.) 531; Haggerty *v.* Granger, 15 How. (N. Y.) Pr. 243; Paton *v.* Wright, Id. 481.

When a partnership formed, not for the purpose of buying and selling, but for a business in which the continued ownership of the partnership property is indispensable, has closed, or is about closing, neither of the partners can make an assignment or sale of the joint property, even for the payment of creditors, when the other is present and capable of acting in the matter, without his consent; and, in such a case, mere knowledge of the intended sale will not be sufficient evidence of assent. Sloan *v.* Moore, 37 Pa. St. 217.

Power of one partner to assign with preferences.—In Egberts *v.* Wood (3 Paige (N. Y.) 517), Chancellor Walworth says: "It appears to be the better opinion that one of the partners, at any time during the existence of the partnership, may assign the partnership effects, in the name of the firm, for the payment of the debts of the company, although, by such assignment, a preference is given to one set of creditors over another. In the case of Dickinson *v.* Legare and others, cited by the complainant's counsel from the equity reports of South Carolina (1 Desaus. 537), the Court of Chancery of that state decided against the validity of an assignment of all the partnership effects, made by one of the partners without the knowledge or consent of the other, to pay the debt of a particular creditor. Chancellor Matthews, who delivered the opinion of the court in that case, admits that it was a question of the first impression, no case analogous to it having come under the view of the court. That assignment, however, was made under very peculiar circumstances. The company, during the revolutionary war, were doing business in this country, and while one of the partners was on a voyage to France he was taken by a British ship of war and carried as a prisoner to England, where he was prevailed upon by a creditor residing there to give him a general assignment of all the partnership funds, which funds were then in this country, to secure the payment of his particular debt against the firm. Although the decision was put upon the general ground that one partner had not the right to assign the partnership funds in this manner without the consent of his copartner, there is no doubt that the particular circumstances under which that assignment took place had a very considerable influence in bringing the mind of the Chancellor to that result. The assignment in that case being made by a citizen of one of the United States, during the existence of the war, to an alien enemy and in an enemy's country, was probably void by the laws of war, so far, at least, as to prevent its being carried into effect by any of the courts of this country; and certainly it could not be considered as made according to any mercantile usage. That decision, however, has been recently overruled by the

(*a*) See Perring *v.* Hone, 4 Bing. 32; 2 Car. & P. 401.

(*b*) Maclae *v.* Sutherland, 3 El. & B. 1.

(*c*) See Elliot *v.* Davis, 2 Bos. & P. 338; Gillow *v.* Lillie, 1 Bing. N. C. 695.

Powers of attorney to draw bills, &c.—In consequence of the doctrine that every member of an ordinary trading partnership has au-

Court of Appeals in the same state, in the case of Robinson *v.* Crowder, 4 McCord (S. C.) 519, where it was held that an assignment by one partner of all the effects of the firm, in payment of the partnership debts, was valid as against his copartners. In Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, in the Circuit Court of the United States for the District of Pennsylvania, Judge Washington doubted the right of one of the partners, without the consent of the others, to assign the whole of the partnership effects in such a manner as to terminate the partnership. But he declined expressing any decided opinion upon this question, which he considered unnecessary to the decision of the cause then before him, as in that case the copartner had subsequently assented to the assignment. In Mills *v.* Barber, 4 Day (Conn.) 428, the Supreme Court of Errors in Connecticut decided that one partner, without the knowledge of the other, might make a valid assignment of partnership funds to secure the payment of a debt due from the firm. See Forkner *v.* Stuart, 6 Gratt. (Va.) 197; and in Harrison *v.* Sterry, 5 Cranch (U. S.) 289, the Supreme Court of the United States decided that one of the partners might assign the partnership effects to a trustee for the security or payment of the creditors of the firm, without the concurrence of his copartners. I do not intend, in this case, to express any opinion in favor of the validity of such an assignment of the partnership effects to a trustee by one partner against the known wishes of his copartner, and in fraud of his right to participate in the distribution of the partnership funds among the creditors, or in the decision of the question which of those creditors should have a preference in payment out of the effects of an insolvent concern. As a court of equity, upon a proper application, would protect the rights of the several partners in this respect before an assignment had actually been made, and if they could not agree among themselves, would appoint a receiver of the effects of the partnership, and would apply them in payment of all the debts due from the firm ratably, it might perhaps apply the same rule to the case of an assignment to a trustee for the payment of the favorite creditors of one of the partners only, where the equitable rights of the parties had not in fact been changed by any proceedings under the assignment."

In a later case, however (Havens *v.* Hussey, 5 Paige (N. Y.) 30), Chancellor Walworth qualified his former opinion and limited his previous decision, saying: "In the case of Egberts *v.* Wood, 3 Paige 517, I had occasion to refer to most of the cases relative to assignments of partnership effects made by one of the copartners. And I then arrived at the conclusion that from the nature of the contract of copartnership one of the partnership might make a valid assignment of the partnership effects, or so much thereof as was necessary for that purpose, in the name of the firm, directly to one or more of the creditors in payment of his or their debts, although the effect of such assignment was to give a preference to one set of creditors over another. But as it was not necessary for the decision of that case, I did not express any opinion as to the validity of an assignment of the partnership effects by one partner, against the known wishes of his copartner, to a trustee, for the benefit of the favorite creditors of the assignor, in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the

thority to draw, accept and endorse bills in its name if a member of such a partnership goes abroad and gives his copartner a power of

creditors, or in the decision of the question as to which of the creditors, if any, should have a preference in payment out of the effects of an insolvent concern. The present case presents that point distinctly for the decision of the court. And, upon the most deliberate examination of the question, I am satisfied that the decision of the Vice Chancellor is correct; that such an assignment is both illegal and inequitable, and cannot be sustained. The principle upon which an assignment by one partner, in payment of a partnership debt, rests is that there is an implied authority for that purpose from his copartner, from the very nature of the contract of partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid, and binding upon his copartner. One member of the firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the copartnership effects; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the copartnership, as it renders it impossible for the firm to continue its business. The case of Harrison *v.* Sterry, 5 Cranch (U. S.) 289, which, perhaps, has gone as far as any other on the subject, was not sustained as an assignment of all the partnership effects to a trustee for the payment of preferred creditors. It professed to be the transfer of a certain specific portion of the partnership property, for the purpose of saving the credit of the firm, and to raise funds to carry on the partnership business. And upon the ground that it was not in fact what it professed to be, but was merely intended to give a preference to particular creditors, the court held the assignment void, as a fraud upon the bankrupt laws. It was only upon the supposition that the assignment was in fact what it professed to be that Chief Justice Marshall held it to be within the power usually exercised by a managing partner." See, also, Wilcox *v.* Jackson, 7 Colo. 521; Bull *v.* Harris, 18 B. Mon. (Ky.) 195; Matter of Lowenstein, 7 How. (N. Y.) Pr. 100.

In Hitchcock *v.* St. John (Hoffm. (N. Y.) Ch. 511), Hoffman, V. C., says, as to the power to prefer creditors: "The power to make a sale of the partnership effects resides in each partner while the relation exists. The power to bind the firm upon a purchase equally exists in each, although the goods never came into joint stock. All these instances of authority, as well as that to make negotiable paper, flow from the principle that each is the agent of the whole. But for what is he such agent? For the purposes of carrying on the business of the firm, and because the authority to do the act is implied from the nature of the business. Best, J., in Barton *v.* Williams, 5 Barn. & Ald. 395, 405. Now, a transfer of all the effects of a firm for payment of its debts, is a virtual dissolution of the partnership. It supersedes all the business of the firm as such. It takes from the control of each

attorney to manage his affairs, and draw, accept or endorse bills in his name, this authority warrants the attorney in putting his principal's name to non-partnership bills only, his authority to put the partnership name to partnership bills being independent of and unaffected by the letter of attorney. (*d*)

Bills, &c., of non-trading partnerships.—With respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his copartners by putting the name of the firm to a negotiable instrument, depends upon the

all the property with which such business is conducted. The purposes of the business, then, clearly do not require that such a power should be implied. What other reason is there for holding that by the contract of partnership it is to be inferred? I do not think that the principle insisted upon by the counsel for the defendant is the true one, namely, that such a transfer is only invalid when it operates as a fraud upon the other partner; when, for example, it is made against his wishes and to give preferences which he is unwilling to give. It strikes me that the principle upon which the invalidity is established lies deeper. I consider that neither during the existence nor after the dissolution of a partnership, can such a transfer be made, because of want of power in any one partner to make it. A direct payment of money or a transfer of property to an acknowledged creditor is an admitted and a necessary power during the existence of the partnership. We probably are compelled by authorities to go so far as to say that it is a necessary surviving power after a dissolution, in whatever way that is effected. All that is requisite to test the transfer is the amount of debt and the extent of the fund assigned. But upon an assignment of the property of a firm to a trustee, a complication of duties and responsibilities is involved. An agent is appointed to control and dispose of the whole. The capacity, integrity and industry of another are brought to the management, and the fitness of the party selected is judged of solely by one member of the firm. From what part or principle of the partnership relation can such an authority emanate? It is impossible to uphold a rule which would rob every member of a firm of a voice and share in this last, and probably most important, act of a failing house. It is no contradiction of this doctrine that where the assignment is made after insolvency, and divides the funds with perfect equality among all the creditors, it will be supported. It is clear that either partner might file a bill, obtain an injunction and receiver and insure an equal distribution of all the funds. An assignment fairly securing the same equality is an object of favor in this court. In the absence of any indication on the part of the copartner of a contrary intention, it may well be inferred that he consents to do justice. A serious question might indeed arise in a case in which, after such an assignment by one partner, the other should make a transfer of a specific piece of property in payment of a just debt of the firm."

In Heye *v.* Bolles (33 How. (N. Y.) Pr. 266), a partner in two separate firms became the purchaser of the whole property of each, and afterward made a general assignment for the benefit of creditors, in

(*d*) Attwood *v.* Munnings, 7 Barn. & C. 278.

nature of the business of the partnership. (*e*) In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers, (*f*) quarry workers, (*g*) *farmers, (*h*) solicitors. (*i*) Where two firms agreed to accept each other's [*131 drafts, and to share the profits arising from their sale, it was held that one of these firms was not liable to a person who had purchased a bill drawn on it by the other firm, but which the drawees had not accepted. (*k*)

If, however, a member of a non-mercantile firm concurs in drawing, or authorizes his partner to draw a bill in the name of the firm, he impliedly authorizes its endorsement in the same name, for the purpose for which it was drawn. (*l*) [11]

which he directed his assignee to pay first his individual debts. It was held that this assignment was fraudulent as against creditors of either firm.

In Marsh *v.* Bennett (5 McLean (U. S.) 117), an assignment, by a partner, of the partnership effects, preferring certain creditors to others, which was contrary to a stipulation in the articles of dissolution, providing for the equal payment of all creditors, was held void.

(*e*) See Dickinson *v.* Valpy, 10 Barn. & C. 128.

(*f*) Brown *v.* Byers, 16 Mees. & W. 252; Dickinson *v.* Valpy, 10 Barn. & C. 128. Compare Brown *v.* Kidger, 3 Hurlst. & N. 853.

(*g*) Thicknesse *v.* Bromilow, 2 Cr. & J. 425.

(*h*) Greenslade *v.* Dower, 7 Barn. & C. 635.

(*i*) Hedley *v.* Bainbridge, 3 Q. B. 316; Levy *v.* Pyne, Car. & M. 453; Harman *v.* Johnson, 2 El. & B. 61, and 3 Car. & K. 272.

(*k*) Nicholson *v.* Ricketts, 2 El. & E. 497.

(*l*) See Garland *v.* Jacomb, L. R., 8 Ex. 216; Lewis *v.* Reilly, 1 Q. B. 349.

11. **Bills and notes of non-trading partnerships.**—While the law holds a commercial firm bound to any *bona fide* holder of a note or draft drawn, accepted or endorsed by any partner in the partnership name, though without the authority of the other partners, and in a matter not connected with their business (Walworth *v.* Henderson, 9 La. Ann. 339), the rule is otherwise as to non-trading partnerships, one member of which cannot so bind his copartner, even though it be for a debt of the firm, unless he has express authority therefor from his copartner, or the giving of such instruments is necessary to the carrying on of the partnership business, or is usual in similar partnerships; and the burden is upon the party suing on such note or bill to prove such authority, necessity or usage. Smith *v.* Sloan, 37 Wis. 285. See, also, Prince *v.* Crawford, 50 Miss. 344.

When, however, a partnership is engaged in a course of business in which the use of its commercial paper is appropriate and reasonably to be expected, or does in fact make use of it, with the common knowledge of the members of the firm, whenever the convenience or necessities of the firm may require, the firm is liable upon commercial paper made in its name by one of its members to one who takes

Authority to transfer bill.—It must be borne in mind that a person who has no authority to use the name of another, so as to render him

it *bona fide*, in the usual course of business, before maturity, and for a valuable consideration, notwithstanding any fraud of the partner making the paper, or misappropriation by him to other uses than those of his firm. Nat. Exchange Bank *v.* White, 30 Fed. Rep. 412.

Such liability is not restricted to the case of a trading copartnership, if by that term is intended one engaged in the business of buying and selling, though it would, as a rule, include such, but extends to all cases where the nature of the business fairly and reasonably implies such use as an appropriate incident thereto, or where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur, and such occasions do in fact occur, and are thus provided for. Ib.

It thus becomes important to ascertain what classes of partnerships are deemed, in law, to be commercial or trading partnerships, and this, of course, depends entirely upon the character of the business done or intended to be done.

The following have been held to be commercial partnerships in such a sense that negotiable paper made or endorsed by one partner will bind the others: A firm engaged in buying and selling cattle (Smith *v.* Collins, 115 Mass. 388; Wagner *v.* Simmons, 61 Ala. 143); or in making collections, even though that be not its principal business (Van Brunt *v.* Mather, 48 Iowa 503); or in the manufacture of refrigerators (Holt *v.* Simmons, 16 Mo. App. 97); or in the real estate brokerage business (Du Bois *v.* Lamson, 18 N. Y. Week. Dig. 490).

On the other hand, the following have been held not to be trading firms within the rule: A firm jointly owning and cultivating land (Benton *v.* Roberts, 4 La. Ann. 216); a grocery firm [accommodation paper] (Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458); a livery stable firm (Levi *v.* Latham, 15 Neb. 509; S. C., 48 Am. Rep. 361); a firm engaged in the business of conducting a theatre (Pease *v.* Cole, 53 Conn. 53; S. C., 55 Am. Rep. 53); a mining firm (Judge *v.* Braswell, 13 Bush. (Ky.) 67); a firm of commission merchants (Hibbler *v.* De Forrest, 6 Ala. 92); partners in the milling business (Graves *v.* Kellenberger, 51 Ind. 66); or in the tavern-keeping business (Cocke *v.* Branch Bank, 3 Ala. 175); or in the practice of physic (Crosthwait *v.* Ross, 1 Humph. (Tenn.) 23); or in the practice of law (Breckenridge *v.* Shrieve, 4 Dana (Ky.) 375); or in the cultivation of sugar (Burnley *v.* Rice, 18 Tex. 481); or in general agricultural work (Ulerg *v.* Ginrich, 57 Ill. 531; Hunt *v.* Chapin, 6 Laus. (N. Y.) 139; McCrary *v.* Slaughter, 58 Ala. 230); a firm engaged in the insurance, real estate and collecting business (Deardorf *v.* Thacher, 78 Mo. 128; S. C., 47 Am. Rep. 95; a firm of mere brokers (Third Bank *v.* Snyder, 10 Mo. App. 211); a partnership between stevedores (Benedict *v.* Thompson, 33 La. Ann. 196); a partnership in the operation of a threshing-machine (Horn *v.* Newton City Bank, 32 Kan. 518).

Various applications of the rule.—A partnership was formed for the purpose of carrying on a farm and a steam sawmill, and the firm also engaged in trade, as the jury found. The managing partner drew bills in the name of the firm, on an accommodation acceptor, to raise money. *Held*, that the firm was bound by them. Kimbro *v.* Bullitt, 22 How. (U. S.) 256.

liable on a bill or note, may nevertheless have sufficient authority to transfer the property therein. (*m*)

Before leaving the subject of negotiable instruments, it may be observed that it is often difficult to say whether they purport to be the paper of a firm, or only that of some one or more of the partners. Unless the paper purports to be the paper of a firm, no one whose name is not on the paper is liable to be sued on it. (*n*) This subject will be adverted to hereafter.

7. *Bonds.*—See "*Borrowing money and deeds.*"

8. *Borrowing money. General power to borrow.*—One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm. The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a trading partnership, and accordingly in a comparatively early case this power was clearly recognized. (*o*) It has been already seen that one partner can bind the firm by a bill or note, upon which

Where three persons are engaged in carrying on a steam saw-mill in copartnership for a specified term, and during its continuance the note of the firm is given, with the concurrence of two of the partners, for necessary supplies ordered by one of them, for the hands engaged in carrying on the business, the partnership is bound by it. Johnston *v.* Dutton, 27 Ala. 245.

The members of a mining partnership may bind one another in matters which one dealing with them might fairly presume to be within the scope of the business, not, perhaps, by a promissory note, but by dealings on credit for working the mine. Manville *v.* Parks, 7 Colo. 128.

Where one member of a firm had put in as stock, his saw-mill and a quantity of saw-logs, against a money equivalent put in by the other—*Held*, that a firm note the former had given for a balance due upon the saw-logs would not bind the firm although it had received the benefit of the logs—no acquiescence of the copartner being shown. Wiltram *v.* Van Wormer, 44 Ill. 525.

A promissory note given by one of two partners in the business of farming and coopering, signed "A B & C D," is binding upon both. McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475.

Where two members of a partnership, formed for the purpose of speculating in lands, loaned money of the firm, in good faith, to a manufacturer, as an inducement to establish mills on their lands, whereby the lands were expected to be enhanced in value, and afterwards the mills proved a bad enterprise and a part of the debt was lost, a court of chancery refused to relieve a third partner, who did not assent to the loan, from bearing his share of the loss. Blair *v.* Johnston, 1 Head (Tenn.) 13.

(*m*) See on this subject, Smith *v.* Johnson, 3 Hurlst. & N. 222; Heilbut *v.* Nevill, L. R., 5 C. P. 478, where, however, the property was held not to pass.

(*n*) Bills of Ex. Act, 1882, § 23.

(*o*) See Lane *v.* Williams, 2 Vern. 277, 292; Rothwell *v.* Humphries, 1 Esp. 406; Denton *v.* Rodie, 3 Camp. 493; Lloyd *v.* Freshfield, 2 Car. & P. 333; Ex parte Bonbonus, 8 Ves. 540; see, too, De Rib-

*132] money may be obtained, by the every*day process of discounting; and the power of one partner to pledge partnership goods for advances is equally well established. (*p*) At the same time, the power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and, consequently, if money is borrowed by one partner for the declared purpose of increasing the partnership capital, (*q*) or of raising the whole or part of the capital agreed to be subscribed in order to start the firm, (*r*) or if the business is such as is customarily carried on on ready-money principles, *e. g.*, mining on the cost-book principle, (*s*) or without borrowing, as in the case of solicitors, (*t*) the firm will not be bound, unless some actual authority or ratification can be proved. Still less will the firm be bound where borrowing is prohibited, and the person advancing the money is aware of the prohibition. (*u*) [12]

eyre *v.* Barclay, 23 Beav. 125; Gordon *v.* Ellis, 7 Man. & G. 607; Brown *v.* Kidger, 3 Hurlst. & N. 853.

(*p*) See, *infra*, "Mortgage" and "Pledge."

(*q*) Fisher *v.* Taylor, 2 Hare 218.

(*r*) Greenslade *v.* Dower, 7 Barn. & C. 635.

(*s*) Hawtayne *v.* Bourne, 7 Mees. & W. 595; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. B. 686.

(*t*) Plumer *v.* Gregory, 18 Eq. 624, as to the £1700.

(*u*) Worcester Corn Exchange Co., 3 De G., M. & G. 180. See, also, the cases in the next note.

12. **Power of one partner to borrow money on credit of firm.**—The general rule is that all the members of a commercial firm are liable for money borrowed by one of the firm, on the credit of the firm, although the money is misappropriated. Onondaga Bank *v.* De Puy, 17 Wend. (N. Y.) 47; Whitaker *v.* Brown, 16 Id. 505; Steel *v.* Jennings, Cheves (S. C.) 183; Gregg *v.* Fisher, 3 Bradw. (Ill.) 261. Even though the money is appropriated to the use of one partner. So, the partnership is liable if one of the firm borrows money, not expressly on his individual credit, if it was used for the benefit of the firm. Church *v.* Sparrow, 5 Wend. (N. Y.) 223.

An acting partner may, for the benefit of his firm, and in order to raise money, use the name of the firm, by accepting a bill of exchange, to be exchanged for the acceptance of another firm. Gano *v.* Samuel, 14 Ohio 592. So, if a partner borrows money upon the security of his firm's acceptance of another's draft, the acceptance, in the absence of matter which will avoid it, establishes the relation of debtor and creditor to the amount of the draft, between the firm and the lender. Saltmarsh *v.* Bower, 22 Ala. 221.

Whether a loan made to one partner is loaned upon his credit or that of the firm, and whether his individual check given therefor is so far payment thereof as to preclude recourse by the lender to the firm, are questions of fact depending upon the intent, understanding and agreement of the parties. Smith *v.* Collins, 115 Mass. 388.

What firms may borrow.—A partner, unless he is a member of a commercial

Overdrawing banking account.—Overdrawing a banking account is borrowing money. (*x*)

firm, or one engaged in general promiscuous trading, has no implied authority to bind his firm by borrowing money and executing promissory notes, mortgages, or other securities, unless the money is necessary for the business, and such pledge of the credit of the firm is usual. Davis *v.* Richardson, 45 Miss. 499. But in Haskinson *v.* Elliott (62 Pa. St. 393) it was held that the rule giving implied authority to borrow on the credit of the firm, within the general scope of its authority, and according to the usual course of its business, applies as well to partnerships formed for mechanical or manufacturing purposes as to commercial partnerships, and to special as well as general partnerships.

And for what purposes.—Several persons, as partners, were engaged in various businesses, and, among other things, took stock in a woolen mill. One of the partners, in order to raise money to carry on the mill, signed the firm name to a note along with other stockholders. *Held*, that the raising of money to keep the woolen mill running was within the scope of the partnership, and the other partners were bound thereby. Morse *v.* Hagenah (Wis.), 32 N. W. Rep. 634. So, in Leffler *v.* Rice (44 Ind. 103), it was held that money may properly be borrowed by a partner to purchase middlings and grain for a mill owned by the firm.

Agreeing to pay usurious interest.—The liability of a partner for the acts of his copartner, done in behalf of the firm, cannot be held to extend to illegal contracts; and, therefore, where money is borrowed at usurious interest by one member, without the knowledge or consent of the other, the latter is not responsible for the money borrowed. Hutchins *v.* Turner, 8 Humph. (Tenn.) 415; Hutchins *v.* Hudson, Id. 426. But a partner who knowingly and without objection allows the financial partner to continually raise money at usurious rates, thereby impliedly gives him authority to bind the firm to pay usurious interest, from which he can only escape by pleading usury. Hurd *v.* Haggerty, 24 Ill. 171.

Rights of innocent lender without notice.—A person lending money to one partner upon a note signed by him in the name of the firm, is entitled to recover therefor against the partnership, if at the time of taking the note he did not know or have reason to know that the money was not to be applied to the use of the partnership; and he is not bound to prove that the money actually went to the use of the firm (Hayward *v.* French, 12 Gray (Mass.) 453; Blinn *v.* Evans, 24 Ill. 317; Sindh *v.* Crowley, 29 Kan. 756), unless the circumstances were such as to put him upon inquiry, and he neglected to inquire. Wagner *v.* Fresche, 56 N. H. 495; Gregg *v.* Fisher, 3 Bradw. (Ill.) 261; Onondaga Bank *v.* De Puy, 17 Wend. (N. Y.) 47; Whitaker *v.* Brown, 16 Id. 505; Steel *v.* Jennings, Cheves (S. C.) 183; Church *v.* Sparrow, 5 Wend. (N. Y.) 223; Haldeman *v.* Bank of Middletown, 28 Pa. St. 440; Potter *v.* Price, 3 Pittsb. (Pa.) 136.

Accountability between partners respecting loans.—Where partners borrow money, to be used in the firm business, it becomes a partnership fund, and no

(*x*) Blackburn Building Soc. *v.* Cunliffe, Brookes & Co., 22 Ch. D. 61, and 9 App. Cas. 827; Waterlow *v.* Sharp, 8 Eq. 501; and Re Cefn Cilcen Mining Co., 7 Eq. 88, *contra*, must be considered as overruled.

Increasing capital.—Connected with the subject of borrowing money, is that of increasing capital. A sole trader who borrows money for the purpose of his trade cannot, with propriety, be said to increase his capital; but if two or more persons are in partnership, and each bor-

matter how they stand on the security given to the lender, they are accountable to one another as partners. Baily *v.* Brownfield, 20 Pa. St. 41.

If one partner, in negotiating a loan for the firm, deceives his copartner, without the privity of the lender, by inserting in the security a private debt of his own, the remedy of such copartner is against the fraudulent partner only. Dowdall *v.* Lenox, 2 Edw. (N. Y.) 267.

When a loan is made by two members of a firm, in a matter foreign to its business, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount. Cooke *v.* Allison, 30 La. Ann. 963.

Illustrations of the foregoing principles.—Where the managing partner of a concern, who had been in the habit of borrowing checks for the purpose of meeting the firm's liabilities, a short time before the firm dissolved called at the office of S. and requested his check, which he received, at his request made payable "to currency," promising to return the amount within an hour or so, until he collect some bills of the firm, which he failed to do—*Held*, that the other partner was liable to pay it, the check having been borrowed on the credit of the firm, though the proceeds were not appropriated to the business of the firm. Stark *v.* Corey, 45 Ill. 431.

At the request of one partner, plaintiff became surety on a note signed by him in the firm name, without the actual knowledge of the other partner, though the money was needed by the firm, and was used by it in its business. *Held*, that having paid the note, plaintiff could recover therefor from the firm. Deitz *v.* Regnier, 27 Kan. 94.

B., who was a partner in a firm, obtained from R. three bonds of the United States, which were made payable to bearer, to be used by the firm and to be returned to R. upon request. B. was on his way to San Francisco to purchase a stock of goods for the firm at the time the bonds were delivered to him, and he proposed pledging them, or in some other way raising money upon them, and to use the money so obtained in the purchase of goods. B. lost his life before reaching San Francisco, and the bonds were lost. *Held*, that the firm was liable to R. for the amount of the bonds. Roney *v.* Buckland, 4 Nev. 45.

A and B, in 1847, were partners in buying wheat. One C let A have $300, and a few days afterwards took his individual note for it. The money was used to pay for grain that A had purchased. In the fall of 1848 A failed, and in the winter following paid part of the note, and gave his note for the balance, $193. In 1849 C sold the note last named to D for $140, which D then paid him. After D had kept the note some time, C, by an instrument in writing, assigned to D all his claim against A and B for moneys loaned them in the spring of 1847. The consideration expressed in the instrument was $193.25, but no new consideration was then received. *Held*, that C, at the time of the sale of the note to D, had a valid claim against the partners A and B, and that this claim was transferred by the sale of the note; or, if not, that it passed by the subsequent assignment. Rose *v.* Baker, 13 Barb. (N. Y.) 230.

Where two parties are jointly inter-

rows money on his own *separate* credit, and the money is then thrown into the common stock, the capital of the firm, as distinguished from the separate capitals of the persons composing it, may, with propriety, be said to be increased. But, in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, *it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, [*133 what is meant is that one partner, as such, has no power to borrow, on the credit of himself and copartners, money, which each was to obtain on his individual credit, and then to bring into the common stock. (*y*) Unless the expression means this, it means nothing. (*z*)

Difference between borrowing and obtaining goods, &c., on credit.— There is a practical difference between borrowing money and procuring works and materials on credit, which requires notice. The difference consists in this, that he who possesses power to borrow on the credit of another has a much more extensive, and therefore more easily abused, trust reposed in him than one who is empowered only to pledge the credit of another for value received, when the pledge is given. A power, therefore, to incur debt, which is necessarily incidental to almost every partnership, by no means involves a power to borrow money, and the cases which show that adventurers in cost-book

ested in the operation of buying and shipping oats, one party may bind both in borrowing oats to be paid in oats, in their common business and for their common benefit. Adee *v.* Demorest, 54 Barb. (N. Y.) 433.

C., abont to go into business with his brother J., put in "as stock for the purpose of forming a partnership with equal shares" certain "gold dust" sent to his wife from her brother R., for which C. subsequently gave his individual note. After the dissolution of the partnership and the death of C., R. brought suit against J., as surviving partner, for the loan to C., claiming it to be a firm debt. On the trial it was proved that J. had used the "gold dust" to buy goods; that he encouraged C. to embark it as capital, and had advised the plaintiff to permit his brother-in-law, C., to put it in the firm as such, but there was no evidence that J. had ever assumed any responsibility in regard to it. *Held*, that the loan was a personal credit to C., and not a loan to the firm; hence, J. was not liable as surviving partner. Donnelly *v.* Ryan, 41 Pa. St. 306.

(*y*) See Greenslade *v.* Dower, 7 Barn. & C. 635; Fisher *v.* Taylor, 2 Hare 218, as to the power of one partner to do this.

(*z*) See Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123.

mines are liable for supplies furnished to the mine, (*a*) but not for money borrowed for the purposes of the mine, (*b*) show that the difference here alluded to is judicially recognized.

The effect of having had the benefit of money improperly borrowed will be noticed hereafter. See *infra*, section 6.

See further, as to borrowing money, *infra*, "*Mortgages and Pledges.*"

9. *Cheques.*—One partner has implied power to bind the firm by cheques, not post dated, (*c*) drawn on the bankers of the firm in the partnership name; (*d*) and if one partner directs the bankers of the firm not to pay a cheque of the firm, the *bankers incur no liability to the firm if they follow such directions. (*e*) [13]

*134]

(*a*) Tredwen *v.* Bourne, 6 Mees. & W. 461; Hawken *v.* Bourne, 8 Id. 703.

(*b*) Hawtayne *v.* Bourne, 7 Mees. & W. 595; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. B. 686; Brown *v.* Byers, 16 Mees. & W. 252. See, also, Beldon *v.* Campbell, 6 Ex. 886.

(*c*) See Forster *v.* Mackreth, L. R., 2 Ex. 163; Bull *v.* O'Sullivan, L. R., 6 Q. B. 209.

(*d*) Laws *v.* Rand, 3 C. B. (N. S.) 442; Backhouse *v.* Charlton, 8 Ch. D. 444. As to cheques drawn by directors, see Re Gloucester, Aberystwith, &c., Rail. Co., 18 Jur. 815, L. J.

(*e*) Before the Jud. Acts, an action for dishonoring the cheque must have been brought in the names of all the partners, and, in the case supposed, such an action could not have been sustained. See *infra*, book II., ch. 3. It is conceived that the statement in the text is correct, notwithstanding the modern rules as to parties.

13. Checks.—Where one partner consents to the application of a check of the firm to an individual debt of his copartner, he may withdraw such consent at any time before such application is in fact made, or the rights of third parties intervene, and after notice by him not to so apply the check, it cannot be so applied. National Bank of Jacksonville *v.* Mapes, 85 Ill. 67.

Where a bank pays out the money of a firm to one partner upon his check, in fraud of the rights of the other, an action at law cannot be maintained in the firm name against the bank, but resort must be had to a court of equity for the relief of the partner claiming to be injured. Church *v.* First National Bank, 87 Ill. 68. See, also, Miller *v.* Price, 20 Wis. 117, as to the necessary parties to such an action.

An overdraft by a partner may bind the firm, although he misapplies the proceeds, in the absence of any facts which should have charged the drawee with notice, where the power existed to overdraw for the firm. Darlington *v.* Garrett, 14 Ill. App. 238.

Where a person who is a member of two firms gives the check of one firm to pay the note of the other, which had been deposited with a banker for collection, a mutual understanding between the firms may well be presumed, and the person receiving the proceeds of the note is not liable in an action by the former firm to restore them. Nor is the notorious insolvency of the member who drew the note and the check constructive notice of his want of authority. Murphy *v.* Camden, 18 Mo. 122.

Where there are two establishments in the same place for carrying on the same business, both conducted by the same per-

10. *Contracts.*—One partner can bind his copartners by varying a a contract made with both in the ordinary course of business. (*f*)

11. *Debts. Payment to one partner.*—If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm. (*g*) After a dissolution, payment to any one of the partners discharges the debtor, (*h*) even though a third person is appointed to collect the debts owing to the firm, and the creditor is aware of that fact. (*i*) But if on a dissolution a debt due to the partnership is assigned to one of the partners, and the debtor has notice of the assignment, he can only pay the assignee. (*k*) If there are two firms with one common partner, and a bill of exchange is given to one firm, and is endorsed by it to the other, payment to the first firm is an answer to an action brought on the bill by the second. (*l*) 14

son, in one of which he is a partner, and in the other sole proprietor, and he obtains moneys from a bank on checks drawn by him and signed with his own name as agent, in an action by the bank against the firm they may show that they are not indebted to the bank, if they did not know the mode in which the checks were drawn. Mechanics', &c., Bank *v.* Dakin, 24 Wend. (N. Y.) 411.

G., a member of a firm, made a check in the firm name, payable to H. or bearer, for the purpose of paying an account due from the firm to H.; but, instead of using the check for that purpose, paid H.'s account by an account which he held individually against H., and by payment of the balance in cash, and subsequently transferred the check to the plaintiff, to pay an individual debt. *Held*, that as it appeared that the check was drawn in good faith to pay a partnership debt, an action would lie upon it against the firm. Gale *v.* Miller, 44 Barb. (N. Y.) 420.

(*f*) Leiden *v.* Lawrence, 2 N. R. 283, Ex.

(*g*) Anon., 12 Mod. 446.

(*h*) Duff *v.* East India Co., 15 Ves. 198; Brasier *v.* Hudson, 9 Sim. 1. See Phillips *v.* Phillips, 3 Hare 281, as to the receipts of a surviving partner.

(*i*) Bristow *v.* Taylor, 2 Stark. 50; Porter *v.* Taylor, 6 Man. & S. 156; King *v.* Smith, 4 Car. & P. 108.

(*k*) See Duff *v.* East India Co., 15 Ves. 213.

(*l*) See Jacaud *v.* French, 12 East 317.

14. Debts: payment to one partner.—Payment of a debt to one partner of a firm is good against the other partners, and a release by one partner to a debtor of the firm is obligatory on the others. Yandes *v.* Lefavour, 2 Blackf. (Ind.) 371; White *v.* Jones, 14 La. Ann. 681; Vanderburgh *v.* Bassett, 4 Minn. 242; Allen *v.* Farrington, 2 Sneed (Tenn.) 526; Scott *v.* Trent, 1 Wash. (Va.) 77; Salmon *v.* Davis, 4 Binn. (Pa.) 375; Gregg *v.* James, Breese (Ill.) 167. A payment to one partner is payment to both, unless strictly forbidden. Gregg *v.* James, *supra;* Scott *v.* Trent, *supra;* Salmon *v.* Davis, *supra.*

Presumptively, whatever one partner does in the collection of a firm debt is done with the consent of the others. Rolfe *v.* Dudley, 58 Mich. 208. Thus, where a written contract is entered into

Payment to one partner of debt not due to firm.—Moreover, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. If it is due, not to the firm, but to one of the partners, the rule does not hold. Therefore, if an owner of goods sells them, the purchase money must be paid to him or his agent, and payment to a person interested with him in the profits accruing from the sale will not do; for though the two may be liable as if they were partners by reason of their community of interest in the profits, it does not there*fore follow that he who is to share the profits is entitled to receive the [*135

by an individual to do certain work, in a suit by him to recover the price of the work, the defendant may show that the plaintiff had a partner in the job, and that the partner had been paid in full. Shepard *v.* Ward, 8 Wend. (N. Y.) 542. The facts of the insolvency of the partner receiving the money, or his misapplication of it, do not affect his right to receive it. Major *v.* Hawkes, 12 Ill. 298; Heartt *v.* Walsh, 75 Ill. 200.

Debts due to a firm may be assigned to either of the partners, and a note given to the assignee for the amount due by a debtor to the firm extinguishes the debt to the partnership. Lamkin *v.* Phillips, 9 Port. (Ala.) 98.

But a debt due to a firm cannot be discharged by one of the partners applying it in payment of an individual debt owing by him to the debtor of the firm, unless done with the knowledge and approbation of the other partners. Everingham *v.* Ensworth, 7 Wend. (N. Y.) 326; McNair *v.* Platt, 46 Ill. 211; Pierce *v.* Pass, 1 Port. (Ala.) 232; Pierce *v.* Hickenburg, 2 Id. 198; Norment *v.* Johnson, 10 Ired. (N. C.) L. 89; Jones' Case, 1 Overt. (Tenn.) 455.

In South Carolina, although one partner may discharge a debt due to the firm by a third person, by discounting it against a debt due by him individually to such person, yet his agreement to discount will not charge the firm with the balance of his private debt remaining due after such discount, nor enable his individual creditor to discount that balance against another debt due by him to the firm. Beckham *v.* Peay, 2 Bailey (S. C.) 133.

An agreement between partners, on dissolution, that one shall have the settlement of their affairs, he assuming all the debts of the firm and agreeing to pay to the outgoing partner all the money contributed by him, except what he had before drawn out, operates as an assignment of the debts due the firm to the remaining partner; and a subsequent release of a debt due the firm by the outgoing partner to a debtor having notice of the agreement, is void. Cram *v.* Cadwell, 5 Cow. (N. Y.) 489. See, also, Lunt *v.* Stevens, 24 Me. 534.

A and B were partners, and on a dissolution of the firm transferred to C all the partnership effects for the purpose of paying and collecting the debts of the firm. C afterwards transferred the partnership property to B. D, a debtor of the firm, after notice of the transfer to C, paid his debt to A. B sued D for the debt. *Held*, that as C was not vested with the title of the partnership effects as assignee, payment to A, as one of the firm, was a good discharge of the debt. Gordon *v.* Freeman, 11 Ill. 14.

proceeds of the sale of the goods themselves, which belong exclusively to the other. (*m*) So, where a court orders payment to be made to one partner by name, the order must be strictly obeyed, and payment to the partner of the person named in the order will not suffice, though both are defendants in the action in which the order is made. (*n*) [15]

Receipts given by one partner.—As one partner can accept payment of a debt due to the firm, so he can effectually release (*o*) and give a valid receipt for such debt. (*p*) It is, however, to be remembered that although one partner has implied authority to get in debts owing to the firm and to give discharges for them, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his copartners, it will not preclude the firm from recovering the money. (*q*) Nor will a release given by one partner bind the firm if the releasing partner acts in fraud of his copartners and in collusion with the debtor. (*r*) [16]

(*m*) See Smith *v.* Watson, 2 Barn. & C. 401.

(*n*) See Showler *v.* Stoakes, 2 Dowl. & L. 3. As to payments by the paymaster-general to one of several partners, see Supreme Court Fund Rules, 1886, r. 63.

15. If one partner receives from a third person payment of a debt owing by him to the firm, which has been allotted to his copartner, the latter may maintain an action against him to recover the amount so received. Crosby *v.* Nichols, 3 Bosw. (N. Y.) 450.

(*o*) See Hawkshaw *v.* Parkins, 2 Swanst. 539, and *post*, "Release."

(*p*) Henderson *v.* Wild, 2 Camp. 561.

(*q*) Farrar *v.* Hutchinson, 9 Ad. & E. 641; Henderson *v.* Wild, 2 Camp. 561.

(*r*) Aspinall *v.* The London & N. W. Rail. Co., 11 Hare 325, and see *post*, "Release."

16. Receipts given by one partner. —A receipt being signed by a firm, and the question being whether the members were bound, or only the one signing it, in the absence of all explanatory evidence, the court should give it the construction which will operate most strongly against those purporting to be bound by it. Hogan *v.* Reynolds, 8 Ala. 59.

Where, however, a member of a commercial firm receives from a firm debtor a note of a stranger, which he receipts for in the firm name, and agrees in the receipt to collect, and after paying the debt to return the proceeds to the debtor, this does not bind his partners who have no notice of the transaction. Pickels *v.* McPherson, 59 Miss. 216.

Instances.—After the dissolution of a firm which had endorsed a note, the maker paid a sum of money to one of the late partners, and took a receipt signed with the firm name, by which it was agreed that the money should be applied to the payment of the note. *Held*, that another partner was not liable on this receipt for the misapplication of the money, the maker of the note not being a dealer with the firm, and being bound to take notice of its dissolution. Sanders *v.* Ward, 23 Ark. 241.

A power of attorney for the sale of land was transmitted through the hands of a partner to the attorney. The attorney sold the land, and afterwards, in the set-

Assent to creditors' deed.—If one of several partners assent to a deed executed by a debtor of the firm in favor of his creditors, the firm is bound by the deed, (*s*) and the doctrine that one partner has no implied authority to bind his copartners by an instrument under seal has no application to such a case. (*t*)

Assent to transfer of debt.—One partner can bind the firm by assenting to a transfer of debt due to it, as, for example, to a transfer of the firm's account from their banker to his successor in business. (*u*) So, where a creditor of the firm assigns the debt due to him, and

*136] *one of the partners recognizes the transfer and promises to pay the transferee, the firm is bound by this promise. (*x*) [17]

Taking bill in payment.—Again, one partner may receive a bill in payment of a debt due to the firm, and so preclude the firm from suing for the debt so long as the bill is running. (*y*)

Payment to an agent of a firm of a bill drawn in his own name and payable to his own order in respect of a debt due to the firm, is not payment to the firm unless he has authority to draw in that way, or the firm gets the money. (*z*)

Settling debts.—Although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment,

tlement of his accounts with the partnership, accounted for the money received for the land with the partner from whom he had received the papers, and took from him a receipt, signed as if for the partnership, which had been dissolved. *Held*, that the partnership was not liable for the money. Hutchins *v.* Gilman, 9 N. H. 359.

(*s*) See Morans *v.* Armstrong, Arms., M. & O., Ir. N. P. Rep. 25; Dudgeon *v.* O'Connell, 12 Ir. Eq. 566.

(*t*) Dudgeon *v.* O'Connell, 12 Ir. Eq. 566.

(*u*) Beale *v.* Caddick, 2 Hurlst. & N. 326. See, also, Backhouse *v.* Charlton, 8 Ch. Div. 444.

(*x*) Lacy *v.* McNeile, 4 Dowl. & R. 7.

17. Assent to transfer of debt.—Ordinarily, one partner has power, without the assent of the others, to transfer or assign a *chose in action* of the partnership. Clarke *v.* Hogeman, 13 W. Va. 718. Thus, one member of a firm may order the contents of a note made payable to the firm or order, to be paid to himself, and maintain a suit in his own name. Burnham *v.* Whittier, 5 N. H. 334.

In Kull *v.* Thompson (38 Mich. 685), where an assignment of a partnership claim was made by an agent of the firm with the consent of one of the partners, to apply on a demand against the agent and the consenting partner—*Held*, that the objection that the assignment was invalid for want of assent of all the partners, only went to the sufficiency of the consideration as between the partnership and the assignees, and could only be raised by the partners themselves.

(*y*) See Tomlins *v.* Lawrence, 3 Moo. & P. 555.

(*z*) See Hogarth *v.* Wherley, L. R., 10 C. P. 630.

it does not follow that he has power to compromise or settle the debt in any way he likes without payment. As a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way; (*a*) and a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set against a debt due to his firm. (*b*) [18]

(*a*) See the last note, and Pearson *v.* Scott, 9 Ch. D. 198; Young *v.* White, 7 Beav. 506; Underwood *v.* Nicholls, 17 C. B. 239; Story on Agency, § 98.

(*b*) Piercy *v.* Fynney, 12 Eq. 69. See, also, Kendal *v.* Wood, L. R., 6 Ex. 243. Compare Wallace *v.* Kelsall, 7 Mees. & W. 264.

18. **Settling debts.**—A partner has power to compromise and discharge a claim of the partnership against a third party. Noyes *v.* New Haven, &c., R. R. Co., 30 Conn. 1; Doremus *v.* McCormick, 7 Gill (Md.) 49. But where money is due, a partner cannot compromise by receiving land from a debtor instead of money. Russell *v.* Green, 10 Conn. 269.

Applying firm claim to liquidation of individual indebtedness.—It is a well-settled principle of the law of partnership that one member of a firm cannot apply a debt due from his creditor to the firm of which he is a member, to cancel his private debt without the assent or ratification of the other partners. Pierce *v.* Pass, 1 Port. (Ala.) 232; Pierce *v.* Hickenburg, 2 Id. 198; Norment *v.* Johnson, 10 Ired. (N. C.) L. 89; Jones' Case, 1 Overt. (Tenn.) 455; McNair *v.* Platt, 46 Ill. 211; Sims *v.* Smith, 12 Rich. (S. C.) 685; Harper *v.* Wrigley, 48 Ga. 570; Thomas *v.* Pennich, 28 Ohio St. 55; Everingham *v.* Ensworth, 7 Wend. (N. Y.) 326. See, however, Beckham *v.* Perry, 2 Bailey (S. C.) 133; and such assent will not, ordinarily, be inferred from mere knowledge of the transaction. Todd *v.* Lorah, 75 Pa. St. 155.

Thus, a surety for a firm, who is also surety for one of its members individually, receiving funds belonging to the firm, has no right to apply them to the payment of the individual debt, without the consent of the other partner; if he does so, and afterwards pays the firm debt with his own money, he will be held as having paid it with the partnership funds. Downing *v.* Linville, 3 Bush (Ky.) 472.

A credit given to one partner on his own separate account is not a discharge, *pro tanto*, of a demand against the partnership, unless it were intended or accepted as such; and if a creditor receive the effects of one of the partners, which he may apply to the payment of his demand against the partnership, yet, if he relinquish, and restore the property, he may still hold all the partners. Barker *v.* Blake, 11 Mass. 16.

However, in Homer *v.* Wood (11 Cush. (Mass.) 62), it was held that if one member of a partnership settles a demand due from him individually, by setting off and discharging a demand due from his creditor to the partnership, although this is a fraud upon the partnership, no action at law can be maintained in the name of the partnership to recover the demand due it from such creditor, the latter having acted in good faith. See, also, Halls *v.* Coe, 4 McCord (S. C.) 136.

Effect of assent or knowledge of other partner.—Where an indebtedness from an individual partner to a third person is canceled by passing a like sum to the credit of such third person in the books of the firm, he may recover the amount in an action of *assumpsit* against

Promise by one partner to pay a debt of the firm.—A promise by one partner to pay a debt owing by the firm, undoubtedly binds the the firm, if the transaction was had with the knowledge or ratification of the other partners. Corbin *v.* McChesney, 26 Ill. 231; Bates *v.* Halliday, 3 Ind. 159.

Where B is indebted to A, and A is indebted to a firm of which B is a co-partner, and it is agreed between A and B that the one demand shall be set off or extinguished by the other, such an agreement is binding upon a subsequent assignee of A's demand against B, if the assent thereto, express, implied, or to be inferred, of the other members of the firm, can be shown. Wilson *v.* Dargan, 4 Rich. (S. C.) 544. Partners in trade who have taken a note for goods sold, may make an agreement while still holding the note, that it shall be satisfied by work done by the maker for one of the partners individually. If one of the partners makes this agreement, and the other assents, and the customer does work enough to cover the note, it is immediately thereby discharged. Camp *v.* Page, 42 Vt. 739. Partners proved to have known, or to have had good reason to know, that a creditor has relied upon an agreement of one of the firm to allow his individual debt to be applied as a credit on the indebtedness of the creditor to the firm, will not be permitted to repudiate it, unless they show that they had given notice, at the earliest practicable period after it had come to their knowledge, that they would not sanction the arrangement. Casey *v.* Carver, 42 Ill. 225.

Various illustrations of the foregoing principles.—Where one of two attorneys, who were partners, received his own notes in part payment of a demand left for collection, and gave the receipt of the firm to the debtor for the claim, and a suit was brought against the attorneys for the amount of the demand, it was held that one partner could not show that the other had received his own notes in payment. Cook *v.* Bloodgood, 7 Ala. 683.

Where it appeared that one partner received of the plaintiff certain promissory notes to collect, for which he gave a receipt in his own name, and the plaintiff, to evince the liability of the partners, by showing that the transaction had relation to the partnership business, offered to prove that such notes were delivered to the partner while he was attending to other concerns of the partnership, to be collected and applied in satisfaction of a note due from the plaintiff to the partnership, and that that partner did accordingly collect one of such notes, and endorse the avails on the plaintiff's note to the partnership, it was held that such evidence was admissible. Brown *v.* Lawrence, 5 Conn. 397.

One of the partners being indebted to the plaintiff, it was agreed that he might take goods out of the store in payment of the debt, and that the same should be charged to the individual partner. Upon dissolution, the partner originally indebted transferred his interest to his co-partner, who afterwards assigned for the benefit of creditors. *Held*, that the assignee was not entitled to recover for goods sold before the assignment, but that for those sold afterwards he could recover, unless it was shown that they were sold by him in pursuance of the original agreement. Woodward *v.* Horst, 10 Iowa 120.

After the dissolution of a partnership, A, one of the partners, bought a horse of B, and gave his note for the price, agreeing that if any thing should be due from B to the firm, A's note should be applied as a credit on the copartnership debt. It appeared that the partnership claims on

firm. (*c*) How far a promise by one partner will prevent the statute of limitations from running in favor of the others will be seen hereafter. (*d*) [19]

B had been deposited with C, another partner, for collection after the dissolution, but prior to the sale of the horse; but there being no proof that B had notice of this trust, or even of the dissolution, it was held that A's contract with B was binding. Combs *v.* Boswell, 1 Dana (Ky.) 473.

The defendant's agent sold and delivered to one of the partners of a grocery firm, to which the defendant was indebted for groceries, certain cattle belonging to the defendant, agreeing to receive the price thereof in groceries at the store of the firm, and that the amount already due should be included as part payment of such price. *Held*, that such agreement was not binding upon the firm, without affirmative proof of their knowledge and consent thereto, and that in the absence of such proof their assignee in insolvency might recover against the defendant the whole amount of his account. Cadwallader *v.* Kroesen, 22 Md. 200.

Attorneys who were partners, rendered services for a client, and afterwards an agreement was made between one of the partners and such client that the services so rendered, and services thereafter to be rendered, should be applied in payment of a debt due from such partner alone to the client, which agreement was not known to the other partner. *Held*, after the death of the partner making the agreement, that the surviving partner could not recover for services rendered by the firm after such agreement; but, as the agreement was executory and without consideration as to the services previously rendered, he could recover for them. Strong *v.* Fish, 13 Vt. 277.

Where one of two partners was individually indebted, and his creditor charged the debt to the firm, and informed both partners that he had done so, and subsequently the indebted partner delivered to the creditor property of the firm in payment of the debt, and this was known to the other partner, who also knew that the creditor supposed that he was receiving the property in payment of the debt, it was held, in an action on book account, brought by the firm against the creditor, and in which they claimed to recover for the property so delivered, that the creditor was entitled to be allowed for the charge thus made by him against the firm. Miller *v.* Dow, 17 Vt. 235.

A was a member of the firms A & B and A & C, and was managing partner in both concerns. Both firms had dealings with the firm of D & E. The firm of A & B was dissolved by the death of B, and was, at the time, largely indebted to A & C, who were also indebted to D & E. A, after B's death, having done the same thing before, transferred the indebtedness of A & C to the firm D & E, from the account between them to the account between D & E and A & B, and credited the same amount to the last-named firm, on the account between A & B and A & C. *Held*, that A had, under the circumstances of the case, authority to do this. Peyton *v.* Stratton, 7 Gratt. (Va.) 380.

(*c*) Anon. *v.* Layfield, Holt 434; Lacy *v.* McNeile, 4 Dowl. & R. 7.

(*d*) A promise to one enures for the benefit of all. White *v.* Williams, Willm., W. & H. 52.

19. Revival of debt by one partner.—Where the members of a firm gave a bond, individually, for a debt of the firm, and property was delivered by them and accepted as a payment thereof, it was held

Tender.—If a debt is owing to a firm, tender to one partner is tender to all, and if a debt is owing by a firm, tender by one partner is tender by all; (*e*) and if, after tender by a firm, the creditor demands the sum tendered, a refusal to pay made by the partner on whom the demand is made is a refusal by the firm. (*f*)

12. *Deeds.*—One partner has no implied authority to bind *his copartners by deed; (*g*) but a release of a debt or demand [*137 stands on a peculiar ground, and will bind the firm, though executed by one partner only. (*h*) A deed executed by one partner, in the name and in the presence of his copartners, is deemed an execution by them; (*i*) and if one partner executes a warrant of attorney in the partnership name, with the consent of his copartner, the court will not set it aside on the ground that the latter did not execute it. (*k*)

A joint and several bond, executed by one partner in the name of himself and copartners, binds him separately, although it is invalid against them; (*l*) and it has been held that a deed purporting to be made by all the partners of a firm, and to assign all their property to trustees for creditors, is operative against a partner who executes it, although his copartners ultimately decline to execute it also. (*m*)[20]

that the bond was thereby discharged, and that it was not in the power of one of the obligors, by agreement with the obligee, to withdraw the payment, and thus again put the bond in force. Jarman *v.* Ellis, 7 Jones (N. C.) L. 77.

(*e*) Douglas *v.* Patrick, 3 T. R. 683.

(*f*) Peirse *v.* Bowles, 1 Stark. 323.

(*g*) Harrison *v.* Jackson, 7 T. R. 207; Steiglitz *v.* Eggington, Holt 141. As to presuming an authority given by deed, see Holt 141.

(*h*) See Hawkshaw *v.* Parkins, 2 Swanst. 539, and as to creditors' deeds, Dudgeon *v.* O'Connell, 12 Ir. Eq. 566. See, in cases of fraud, *ante* p. *135, note (*r*), and *infra*, "Release."

(*i*) Ball *v.* Dunsterville, 4 T. R. 313; Burn *v.* Burn, 3 Ves. 578. See, as to ratifying a deed executed by one person for another, Tupper *v.* Foulkes, 9 C. B. (N. S.) 797. In Orr *v.* Chase, 1 Mer. 729, a bond executed by one partner, in the name and on behalf of the firm, was held to be the bond of the firm; and see Palmer *v.* Justice Assurance Society, 6 El. & B. 1015.

(*k*) Brutton *v.* Burton, 1 Chitty 707.

(*l*) Elliott *v.* Davis, 2 Bos. & P. 338.

(*m*) Bowker *v.* Burdekin, 11 Mees. & W. 128; Cumberledge *v.* Lawson, 1 C. B. (N. S.) 709; and compare Latch *v.* Wedlake, 11 Ad. & E. 959, and Lascaridi *v.* Gurney, 9 Jur. (N. S.) 302, C. P.

20. Deeds: The general rule requiring special authority.—It is a well-settled, though technical rule of the common law, that one partner cannot bind his copartner by the execution of a deed (Anthony *v.* Butler, 13 Pet. (U. S.) 423), unless his authority so to do is itself under seal. Donaldson *v.* Kendall, 2 Ga. Dec. 227; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375; Snyder *v.* May, 19 Pa. St. 235; Napier *v.* Catron, 2 Humph. (Tenn.) 534; Lambden *v.* Sharp, 9 Id. 224; Mor-

13. *Distress.*—If several partners grant a lease, any one of them may distrain, or appoint a bailiff to distrain, in the name of all; and

ris *v.* Jones, 4 Harr. (Del.) 428.

In Blackburn *v.* McCallister (Peck (Tenn.) 371) it is held that he may do so if the terms of the partnership authorize it; but, in Napier *v.* Catron, *supra*, where, in the agreement of partnership, under seal, each partner was authorized to bind his copartners by deed, and such agreement expired by its own limitation, and was continued by a written agreement, not under seal, it was held that the continuation did not carry with it the power; and that a mortgage of real estate, executed by one of the firm to secure the partnership, did not bind the other members.

In Harrison *v.* Jackson (7 T. R. 207, 210) Lord Kenyon said: "The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now, for the first time, insisted on, except in the *nisi prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed. But I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners."

The acting partner of a mercantile partnership cannot transfer the real property of the firm in the same manner as its personal property; the conveyance, as well as the descent of real property, is regulated by statute; and neither of these modes is affected by any general law of partnership. Piatt *v.* Oliver, 3 McLean (U. S.) 27; affirmed on other grounds, 3 How. 333.

For the same reason, one partner cannot execute a bond under seal, in the partnership name, so as to bind the other partner (Gerard *v.* Basse, 1 Dall. (U. S.) 119; Hart *v.* Withers, 2 Pen. (N. J.) 285; Button *v.* Hampson, Wright (Ohio) 93; McDonald *v.* Eggleston, 26 Vt. 154; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; and the plea of *non est factum* will be sustained in an action against the firm on a bond so executed, even though it was executed under an authority from the copartner, not under seal, to execute a note in his name. Henry County *v.* Gates, 26 Mo. 315. In short, at common law, one partner cannot do any act under seal to affect the interests of his copartner, unless it is to release a debt. M'Bride *v.* Hagan, 1 Wend. (N. Y.) 326.

Cases holding parol or verbal authority sufficient.—In Gram *v.* Seton (1 Hall (N. Y.) 262) a case decided in the Superior Court of the city of New York, Jones, C. J., after reviewing the English and American cases on this subject, says: "The principle that a partner cannot, by virtue of the authority he derives from the relation of copartnership, bind his copartner by deed, has been too long settled to be now shaken. It is the technical rule of the common law applicable to deeds which has been engrafted into the commercial system of the law of partnership; and unless the charter party in question can, under the circumstances of

a distress by one partner, or by the bailiff appointed by him, will be lawful, although the other partners are no parties to the distress and do not assent thereto. (*n*)

this case, be construed to be the deed of Bunker, the defence must prevail. The reasons for the restrictions are not very satisfactory, for all the mischiefs which the expositors of the rule ascribe to the authority of members of a copartnership to seal for their copartners may flow almost as extensively, and nearly with equal facility, from the use of the name and signature of the copartnership. The dangers of allowing the use of a seal to the members of a copartnership are supposed to consist in these two attributes of the seal: that it imports a consideration, and that it is competent to convey absolutely, or to charge and encumber real estate. But negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and, upon general principles, the use of the seal of the copartner, equally with the signature of the copartnership, would, if permitted, be restricted to copartnership purposes and copartnership operations solely, and the joint deed of the copartners, executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the copartners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his copartner and to charge and encumber his estate as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority? Those powers undeniably place the fortune of the members of a general copartnership, to a great degree, at the disposal of any one of the copartners; but it is necessary to the beneficial management of the joint concern that extensive powers should be vested in the members who compose it; and when the copartners live remotely from each other, their joint business concerns cannot be advantageously conducted or carried on without a latitude of authority in each which is inconsistent with the perfect safety of the other copartners. It cripples the operation of a partner, whose distant residence precludes a personal cooperation, to deny him the use of the seal of his copartner for instruments requiring it, and which the exigencies of their joint concerns render expedient or beneficial to them. He must be clothed with the power to execute deeds for his copartner when necessarily required for the purposes of the trade; and if that authority is not inherent in the copartnership, it must be conferred by letter of attorney, and it must be general, or it will be inadequate to the ends of its creation. A copartnership, especially, which is employed in foreign trade, and has occasion to employ ships for the transportation of merchandise, or to borrow money on *respondentia*, if its members are dispersed, as is often the case, must be seriously embarrassed in its operations by the application of the rule that requires every copartner who is to be bound by the charter party or the *respondentia* bond to seal it personally, or by attorney duly constituted for that specific purpose, with its own seal. Similar difficulties would arise out of the same rule when the operations of the house required the copartnership to execute other deeds. Can it then be that this stern rule of the common law, which

(*n*) See Robinson *v.* Hofman, 4 Bing. 562, and the cases there cited.

14. *Extension of business.*—It follows, from the principles investigated at the commencement of the present chapter, that one partner has its appropriate sphere of action, and a most salutary operation on those relations of society where men not otherwise connected are the owners of undivided property, is to be applied in all its force, and to govern with unbending severity in the concerns of copartners whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other, to give to their operations efficiency, vigor and success? The pressure of these considerations has induced a relaxation of the common law rule to adapt it to the exigencies of commercial copartnerships and other associations of individuals operating with joint funds for the common benefit. The rule itself remains, but the restrictions it imposes are qualified by the application of other principles. The general authority of a partner, for example, derived from his relation to his copartners, does not empower him to seal an instrument for them, so as to make it binding upon them without their assent and against their will. This is the fair import of the modern cases, and is, I apprehend, the principle courts are disposed to apply to the use of a seal in joint contracts for copartnership purposes. An absent partner is not bound by a deed executed for him by his copartner, without his previous authority or permission or his subsequent assent and adoption. But the previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol. These are the results which I deduce from the judicial decisions, especially those of our own courts, on the subject; and, if I am correct in my deduction, the conclusion must be favorable to the validity of this charter party as the deed of both the partners." See, also, to the effect that the authorization may be by parol, Grady *v.* Robinson, 28 Ala. 289; Herbert *v.* Hanrick, 16 Ala. 581; Drumwright *v.* Philpot, 16 Ga. 424; Haynes *v.* Seachrest, 13 Iowa 455; Ely *v.* Hair, 16 B. Mon. (Ky.) 230; Pike *v.* Bacon, 20 Me. 280; Cady *v.* Sheperd, 11 Pick. (Mass.) 400; Clement *v.* Brush, 3 Johns. (N. Y.) Cas. 180; Swan *v.* Stedman, 4 Metc. (Mass.) 548; Fox *v.* Norton, 9 Mich. 207; Gwinn *v.* Rooker, 24 Mo. 290; Smith *v.* Kerr, 3 N. Y. 144; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165; Johns *v.* Rattin, 30 Pa. St. 84; Lowery *v.* Drew, 18 Tex. 786; Wilson *v.* Hunter, 14 Wis. 683.

Thus, an attachment bond signed and sealed by one partner in the firm name, and authorized or ratified by parol, is valid. Jeffreys *v.* Coleman, 20 Fla. 536. In Alabama, however, a deed by one partner in the firm name conveys only his interest, though subsequently the other partners orally assent. Bumson *v.* Morgan, 76 Ala. 593.

Previous assent or subsequent acquiescence or ratification.—The weight of authority is to the effect that while one partner cannot bind his associates by deed, by virtue of the contract of partnership, yet where he executes a sealed instrument in the name of the firm, under a prior verbal authority, or subsequent verbal ratification, it is binding on the firm (Grady *v.* Robinson, 28 Ala. 289; Herbert *v.* Hanrick, 16 Ala. 581; Gibson *v.* Wardon, 14 Wall. (U. S.) 244; Drumwright *v.* Philpot, 16 Ga. 424; Haynes *v.* Seachrest, 13 Iowa 455; Ely *v.* Hair, 16 B. Mon. (Ky.) 230; Pike *v.* Bacon, 20 Me. 280; Cady *v.* Sheperd, 11 Pick. (Mass.) 400; Clement *v.* Brush, 3 Johns.

has no implied power to bind the firm with respect to matters not falling within the scope of the business which it ostensibly carries on or was formed to carry on.(*o*)

(N. Y.) Cas. 180; Swan *v.* Stedman, 4 Metc. (Mass.) 548; Fox *v.* Norton, 9 Mich. 207; Gwinn *v.* Rooker, 24 Mo. 290; Smith *v.* Kerr, 3 N. Y. 144; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165; Johns *v.* Rattin, 30 Pa. St. 84; Lowery *v.* Drew, 18 Tex. 786; Wilson *v.* Hunter, 14 Wis. 683); and that the assent of the other partner may be implied from circumstances. Person *v.* Carter, 3 Murph. (N. C.) 321; Layton *v.* Hastings, 2 Harr. (Del.) 147; Doe *v.* Tupper, 4 Sm. & M. (Miss.) 261; Morse *v.* Bellows, 7 N. H. 549; Lucas *v.* Sanders, 1 McMull. (S. C.) 311; Lee *v.* Onstott, 1 Ark. 206; Montgomery *v.* Boon, 2 B. Mon. (Ky.) 244; M'Cart *v.* Lewis, Id. 267; Cummings *v.* Carsily, 5 Id. 47; Bentrin *v.* Zierlien, 4 Mo. 417; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113.

But the previous authorization or assent, or the subsequent ratification, must be proved by him who seeks to enforce the instrument against the other partner (Shirley *v.* Fearne, 33 Miss. 653), otherwise the deed will only pass the individual interest of the signing partner. Walton *v.* Tosten, 49 Miss. 569. See, however, Kasson *v.* Brocker (47 Wis. 79), where, on an appeal from the disallowance of a claim of partners in their firm name, the appeal bond is executed in the firm name, the presumption is, in the absence of all proof, that it was so executed as to bind both partners and the mode of execution approved. *Contra*, Butterfield *v.* Hemsley, 12 Gray (Mass.) 226. But a declaration alleging that the partners "made their certain writing obligatory signed by their firm name," "and sealed with their seal," &c., is good on demurrer; if it was the deed of but one, it must be shown by plea on the part of the partner who did not execute the bond. Massey *v.* Pike, 20 Ark. 92.

The instrument may become binding on the other partners on the principles of estoppel and ratification. Mann *v.* Etna Ins. Co., 40 Wis. 549; Baldwin *v.* Richardson, 33 Tex. 16. And the bringing of an action upon it, by the firm, is an adoption of the instrument, and the defendant cannot object that it is not the deed of the partnership. Dodge *v.* M'Kay, 4 Ala. 346.

Again, such a deed is binding on the partner who does not execute it, if he is present and sees the other partner execute it, and does not object; his acquiescence, with full knowledge of the act done, amounts to consent. Kasson *v.* Brocker, 1 N. W. Rep. (N. S.) 418; Anthony *v.* Butler, 13 Pet. (U. S.) 423; Baldwin *v.* Richardson, 33 Tex. 16; Bentrin *v.* Zierlien, 4 Mo. 417; Blackburn *v.* McCallister, Peck (Tenn.) 371; Button *v.* Hampson, Wright (Ohio) 93; Cummins *v.* Cassidy, 5 B. Mon. (Ky.) 74; Day *v.* Lafferty, 4 Ark. 450; Doe *v.* Tupper, 12 Miss. 261; Donaldson *v.* Kendell, 2 Ga. Dec. 227; Fitchburn *v.* Boyer, 5 Watts (Pa.) 159; Fleming *v.* Dunbar, 2 Hill (S. C.) 532; Gerard *v.* Basse, 1 Dall. (U. S.) 119; Hart *v.* Withers, 2 N. J. L. 285; Henderson *v.* Barbee, 6 Blackf. (Ind.) 26; Hodson *v.* Porter, 2 Colo. T. 28; James *v.* Bostwick, Wright (Ohio) 142; Lambden *v.* Sharp, 9 Humph. (Tenn.) 224; Layton *v.* Hastings, 2 Harr. (Del.) 147; Lee *v.* Onstott, 1 Ark. 206; Little *v.* Hazard, 5 Harr. (Del.) 291; Lucas *v.* Saunders, 1 McMull. (S. C.) 311; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; M'Cart *v.* Lewis, Id. 267;

(*o*) *Ante* p. *124, *et seq.*

*138] **Guarantees and indemnities.*—How far one partner can bind the firm by a guarantee, obliging the firm to pay, if some other person does not, has been much disputed. The later cases,

McDonald *v.* Eggleston, 26 Vt. 154; Modisett *v.* Lindley, 2 Blackf. (Ind.) 119; Montgomery *v.* Boone, 2 B. Mon. (Ky.) 244; Morris *v.* Jones, 4 Harr. (Del.) 428; Morse *v.* Bellows, 7 N. H. 550; Napier *v.* Catron, 2 Humph. (Tenn.) 534; Person *v.* Carter, 3 Murph. (N. C.) 321; Pettes *v.* Bloomer, 21 How. (N. Y.) Pr. 317; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; Posey *v.* Bullitt, 1 Id. 99; Price *v.* Alexander, 2 Gr. (Iowa) 427; Snyder *v.* May, 19 Pa. St. 235; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113; United States *v.* Astley, 3 Wash. (U. S.) 508.

Instrument equally operative without a seal.—Where the instrument would be equally operative without a seal, the rule does not apply, *e. g.*, in the case of a sealed bill of sale of partnership property. Patten *v.* Kavanagh, 11 Daly (N. Y.) 348. S. P., Keller *v.* West, 39 Hun (N. Y.) 348; Everit *v.* Strong, 5 Hill (N. Y.) 163.

In Ex parte Bosanquet (De Gex 432) the Chief Judge in Bankruptcy said: "As to the objection that the security, being effected by a deed executed by one partner, could not bind the firm, it might be true that the instrument would not take effect as the deed of the firm; but the transaction itself was one within the authority of the partner, and the circumstance of a deed being executed would not invalidate the contract." Accordingly, one partner may transfer personal property of the firm in payment of a *bona fide* firm debt, even though he do so by deed under seal. Hodges *v.* Harris, 6 Pick. (Mass.) 362.

In Forkner *v.* Stuart (6 Gratt. (Va.) 197), where one partner, in the absence of his copartner, executed a bill of sale, under seal, of all the partnership effects, the sale being *bona fide*, and for the full value of the property, and made to pay a pressing debt of the absent partner, it was held that the sale was binding upon the absent partner, and passed the whole title of the firm to the property.

So, where a partner executes a bond in the name of the firm, and, upon being informed that it did not bind the partners, with the consent of the obligor, removes the seal, and redelivers it, with the intent to bind the company, it is effectual as their promissory note. Horton *v.* Child, 4 Dev. (N. C.) L. 460. Other well-considered cases, however, hold that a bond given in the partnership name, by one of the partners, for a simple contract debt due by the firm, does not extinguish the original debt as to the firm. Flemming *v.* Lawhorn, Dudley (S. C.) 360; Dickinson *v.* Legare, 1 Dessau. (S. C.) 537; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165. But see Jacobs *v.* M'Bee, 2 McMull. (S. C.) 348. So, also, it has been held that a sealed lease executed by one partner only, in the name of the partnership, though for a term which required no seal, does not pass the estate of the other partners without evidence of previous authority or subsequent ratification by them. Dillon *v.* Brown, 11 Gray (Mass.) 179.

The true rule is thus stated by Chief Justice Marshall, in Anderson *v.* Tompkins, Brock. (U. S.) 456, 462: "It is said this transfer of property is by a deed, and that one partner has no right to bind another by deed. For this a case is cited which, I believe, has never been questioned in England or in this country. Harrison *v.* Jackson, 7 T. R. 207. I am not, and never have been satisfied with the extent to which this doctrine has been carried. The particular point deci-

however, decide that unless it can be shown that the giving of guarantees is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied

ded in it is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. That was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to the decision. No action can be sustained against the partner, who has not executed the instrument, on the deed of his copartner. No action can be sustained against the partner which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled. But I cannot admit its application in a case where the property may be transferred by delivery, under a parol contract, where the right of sale is absolute, and the change of property is consummated by delivery. I cannot admit that a sale, so consummated, is annulled by the circumstance that it is attested by, or that the trusts under which it is made are described in a deed. No case goes thus far, and I think such a decision could not be sustained on principle."

Binding on partner executing it, though not on copartner.—When one partner, without the consent of his copartner, gives the security of the firm, under seal, for a partnership debt, and the creditor afterwards releases the copartner from all partnership debts, the simple debt being merged in the specialty, the copartner is released; but the specialty still binds the partner who signed the partnership name. Clement *v.* Brush, 3 Johns. (N. Y.) Cas. 180. S. P., Williams *v.* Hodgson, 2 Harr. & J. (Md.) 474.

Thus, where two of three partners were present, and one wrote and the other sealed a note, given in the name of the firm, it is competent to go to the jury on the joint execution. It is not material to the liability of the two that they used the name of the firm without the third partner's assent. Potter *v.* McCoy, 26 Pa. St. 458.

The members of a copartnership are tenants in common of land owned by the firm; and a deed by all the firm, but executed by only one partner, is effectual to convey that partner's undivided interest. Jackson *v.* Standford, 19 Ga. 14; Layton *v.* Hastings, 2 Harr. (Del.) 147; Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside, on the ground that it was made without their consent and impairs the credit of the firm. Treadwell *v.* Williams, 9 Bosw. (N. Y.) 649.

But in Fisher *v.* Pender (7 Jones (N. C.) L. 483), where, upon the face of an instrument, it appeared that one signed, sealed and delivered it, in order to bind the firm of which he was a member, and not as his own individual deed, it was held that he was not individually bound.

Effect of instrument so executed as evidence.—The execution of a bond under seal, without authority, by one of several partners, in the name of the firm, creates no presumption that the bond was received in satisfaction of the joint liability of all the members of the firm. Doniphan *v.* Gill, 1 B. Mon. (Ky.) 199; Brazee *v.* Poyntz, 3 Id. 178.

A bond made by one of the partners of

authority to bind the firm by them, for, generally speaking, it is not usual for persons in business to make themselves answerable for the conduct of other people. The subject was much considered in Brettel

a firm, for goods sold and delivered, may be evidence of the time for payment, or of the amount (as any other statement of one of the partners would be), but it certainly does not amount to plenary proof of the consideration, so as, of itself, to entitle the plaintiff to recover of the firm for goods sold and delivered. Fronebarger *v.* Henry, 6 Jones (N. C.) L. 548.

Scope and extent of the rule.—One partner cannot bind his copartner to execute a deed with covenants of general warranty. Ruffner *v.* McConnell, 17 Ill. 212.

So, a surviving partner cannot alone convey real estate belonging to the firm. Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631.

A bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm, by only one of two partners named as principals therein, cannot be enforced against a surety without evidence of the assent of the other partner to its execution. Russell *v.* Annable, 109 Mass. 72.

Where one partner signs the partnership name to a forthcoming bond, in a case in which the partnership is defendant, the bond is void as to the partners not signing it. Doe *v.* Tupper, 4 Sm. & M. (Miss.) 261; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113.

So, also, one partner cannot bind his copartner by warrant of attorney, under seal, in the firm name, without authority. Ellis *v.* Ellis, 18 Vr. (N. J.) 69, or by executing an appeal bond for both, under his general authority. People *v.* Judges of Dutchess, 5 Cow. (N. Y.) 34; Charman *v.* McLane, 1 Oreg. 339.

Its limits and exceptions.—It has been held that one partner may execute a power of attorney (Re Barrett, 2 Hughes (U. S.) 444), or a charter party under seal (Straffin *v.* Newell, T. U. P. Charlt. (Ga.) 163), or a deed of composition, or release of a debt due the firm (Bruen *v.* Marquand, 17 Johns. (N. Y.) 58; Smith *v.* Stone, 4 Gill & J. (Md.) 310; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; Morse *v.* Bellows, 7 N. H. 549; Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41; Crutwell *v.* De Rossett, 5 Jones (N. C.) L. 263), so as to bind his copartner, or the firm to which he belongs.

So, it is said that a bond by two partners, to one of them as obligee, may be obligatory on the other partner (O'Bannon *v.* Simrall, 1 B. Mon. (Ky.) 287); that a bond, given by one partner for the rent of real estate leased for the use of the partnership, is properly payable out of the partnership effects; and having been so paid, creditors of another partner cannot be substituted to the rights of the landlord on the bond (Christian *v.* Ellis, 1 Gratt. (Va.) 396); and that one partner, by an instrument under seal, may authorize a third person to discharge a debt due to the firm. Wells *v.* Evans, 20 Wend. (N. Y.) 251; 22 Id. 324.

Under urgent circumstances one partner, to prevent the sacrifice of the firm's real estate, may give a deed of trust thereof to secure a firm debt. Breen *v.* Richardson, 6 Colo. 605.

In Durant *v.* Rogers (87 Ill. 508), property of a firm was levied upon under a judgment against a portion only of the partners, for a trespass committed by the active and managing partners, who, to save the property, procured plaintiff to unite with them in an appeal bond, whereby he was compelled to pay the judgment. *Held*, that each member of the firm became liable to him for the

v. Williams.(*p*) There the defendants, who were railway contractors, made a subcontract for the performance of part of some work they had undertaken. The subcontractor required a quantity of coal, and one of the defendants, in the name of the firm, guaranteed to the plaintiffs, who were coal merchants, payment for coals to be supplied by them to the subcontractors. It was held that this guarantee did not bind the partners of the contractor signing it.

In Sandilands *v.* Marsh(*q*) a firm was held bound by a guarantee given by one of the partners, but in that case there was evidence of adoption and ratification by the firm of the contract of which the guarantee was part. In Ex parte Harding(*r*) the guarantee was several as well as joint, and therefore bound those who signed it. These cases cannot therefore be considered as opposed to those in which it has been held that one partner has no implied power to bind the firm by guarantees in its name.[21]

amount so paid to their use, whether they all united in the appeal or not, and that no proof of a promise to pay on the part of one of them not sued, and who did not join in the appeal, was necessary, as the law implied a promise, and that in such case the validity of the judgment appealed from was wholly immaterial.

In Murrell *v.* Murrell (33 La. Ann. 1233) it is held that one partner may convey property of the firm to his wife, in satisfaction of her claim for her paraphernal funds held by the firm.

In Gates *v.* Pollock (5 Jones (N. C.) L. 344), where one of two partners, who had entered into a contract to do a job of work according to specifications, executed an instrument under seal, certifying that the contract was forfeited on their part, and that there had been a settlement and payment to him of a certain sum as a "present," it was held that such instrument amounted to a release, and took away the cause of action as to both partners.

(*p*) 4 Ex. 623. See, also, Hasleham *v.* Young, 5 Q. B. 833; Crawford *v.* Stirling, 4 Esp. 207; Duncan *v.* Lowndes, 3 Camp. 478. The *dictum* of Lord Mansfield in Hope *v.* Cust, 1 East 53, and the decision of Lord Eldon in Ex parte Gardom, 15 Ves. 286, are opposed to these authorities, but cannot be relied on after the decision in Brettel *v.* Williams.

(*q*) 2 B. & A. 673.

(*r*) 12 Ch. D. 557.

21. **Guarantees and indemnities.**—The rule is well settled that one partner cannot, by his individual act, bind the firm as the guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety of another, without authority specially given him for the purpose, or implied from the common course of business of the firm, or from the previous course of dealings between the parties, unless the act of such partner be afterwards ratified by the others. Sweetser *v.* French, 2 Cush. (Mass.) 309; Rollins *v.* Stevens, 31 Me. 454; Bank of Rochester *v.* Bowen, 7 Wend. (N. Y.) 158; Mayberry *v.* Barniton, 2 Harr. (Del.) 24; Maudlin *v.* Branch Bank, 2 Ala. 502; Selden *v.* Bank of Commerce, 3 Minn. 166; Hamill *v.* Purviss, 2 Pa. 177; Sutton *v.* Irwine, 12

Statute of frauds.—With respect to the statute of frauds, a guarantee signed by one partner in the name of the firm is sufficient to bind all the partners, if authority from them can be proved.(*s*)

Serg. & R. (Pa.) 13; McQuewans *v.* Hamlin, 35 Pa. St. 517. And he who seeks to hold the firm in such cases, has the burden of proving authority, consent or ratification. Schermerhorn *v.* Schermerhorn, 1 Wend. (N. Y.) 119; Davis *v.* Blackwell, 5 Ill. App. 32; Rolston *v.* Click, 1 Stew. (Ala.) 526; Foot *v.* Tabir, 19 Johns. (N. Y.) 154; Boyd *v.* Plumb, 7 Wend. (N. Y.) 309; Langan *v.* Hewett, 13 Sm. & M. (Miss.) 122; Andrews *v.* Planters' Bank, 7 Id. 192. The authority must be strictly proved, but not necessarily by a written authorization. Moran *v.* Prather, 22 Wall. (U. S.) 492. It may be proved by circumstances (Butler *v.* Stocking, 8 N. Y. 408); but cannot be established by any act alone of the partner who assumed to execute the alleged guaranty. Osborne *v.* Stone, 30 Minn. 25.

But the power to sign the firm name, by endorsement, for accommodation purposes, will not authorize the signature of the firm name in the face of the note, as an unconditional and distinct surety. McGuire *v.* Blanton, 5 Humph. (Tenn.) 361.

While it is not within the ordinary powers of a partner to bind the firm to pay the debt of a third person (Shaaber *v.* Bushong, 105 Pa. St. 514), still, each partner is the general agent of the firm, and has authority to bind it by a contract of guaranty, if such contract is within its scope of business; and no understanding between the partners can affect the right of the guarantee to recover. First Nat. Bank *v.* Carpenter, 41 Iowa 518.

So, also, the act may be ratified by the other partners, and so become binding upon them. Marsh *v.* Gold, 2 Pick. (Mass.) 285; Cockroft *v.* Claflin, 64 Barb. (N. Y.) 464; Clark *v.* Hyman, 55 Iowa 14.

Chancellor Kent says (3 Com. 46): "It was formerly understood that one partner might bind his copartners by a guaranty or letter of credit in the name of the firm; and Lord Eldon, in the case of Ex parte Gardom, considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, both in England and in this country, that one partner is not authorized to bind the partnership by a guaranty of the debt of a third person, without a special authority for that purpose, or one to be implied from the previous course of dealing between the parties, unless the guaranty be afterwards adopted and acted upon by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and then it will be obligatory upon the company, and this is the principle on which the distinction rests. The same general rule applies when one partner gives the copartnership, as a mere and avowed surety for another, without the authority or consent of the firm; for this would be pledging the partnership responsibility in a matter entirely unconnected with the partnership business."

Lord Mansfield, in a case where the firm sought to be charged were bankers (Hope *v.* Cust, cited in Sherriff *v.* Wilks, 1 East 48, 53), is said to have remarked: "There is no doubt but that the act of every single partner, in a transaction relating to the partnership, binds all others. If one gives a letter of credit or guaranty in the name of all the partners, it binds all." Which is, no doubt, a correct state-

(*s*) See Duncan *v.* Lowndes, 3 Camp. 478.

But no partner is liable for a false and fraudulent representation as to the solvency of another person, unless such representation is in writing, and signed by himself. (*t*)

ment of the rule, as applicable to a banking firm, but not when applied to an ordinary trading partnership, such as was sought to be held for the act of one partner in Duncan *v.* Lowndes (3 Campb. 478), where Lord Ellenborough lays down the law as follows: "As it is not usual for merchants, in the common course of business, to give collateral engagements of this sort, I think you must prove that Lowndes had authority from Bateson to sign the partnership firm to the guaranty in question. It is not incidental to the general power of a partner to bind his copartners by such an instrument. The case was not, however, a guaranty in the partnership business, but a guaranty of the acceptances of a third person, not belonging to the partnership funds. In Sandilands *v.* Marsh, 2 Barn. & Ald. 673, a guaranty of an annuity by one partner, the partnership not dealing in annuities, but the dealing in this annuity being known to the other partner, and not disapproved of by him, and he having no knowledge of the guaranty, was held to bind the partnership, upon the ground that the transaction as to the annuity being adopted as a part of the business binding on the partnership, the whole transaction bound the partnership, although the guaranty was not known. This must have been sustained upon the notion that dealers in annuities, in the ordinary course of things, were accustomed to guarantee them; for the mere adoption of an act of one partner, where there was a concealment of material circumstances, might not bind him, if the business were not within the scope of their ordinary business."

Instances and illustrations. — Two years after the dissolution of a firm, one partner signed the firm name to a guaranty. *Held*, that this being beyond his power, it was immaterial that the party to whom the guaranty was given had no notice of the dissolution of the firm. Spurck *v.* Leonard, 9 Ill. App. 174.

A firm had authorized a partner to borrow money for it, and allowed him frequently to fill up notes over their blank signatures, and to sign the names of the members of the firm to obligations, and such partner borrowed money for the use of the firm, upon his note, with the names of his copartners endorsed thereon as guarantors. *Held*, that it did not matter even if their names were so signed by such partner, as he was held out to the world as having authority to do what he did; and that the other partners were liable on such guaranty. Pahlman *v.* Taylor, 75 Ill. 629.

In Wilkins *v.* Pearce (5 Den. (N. Y.) 541) it was held that an agreement, made by one partner of a mercantile firm, in the partnership name, to indemnify a third person for accepting, for the accommodation of the firm, a draft drawn upon him by such partner, is valid, although another of the partners at the time dissented from the agreement.

Where one partner signed the firm name to a guaranty in the following form: "If you rent your house to H., I will be responsible for the rent of the same as long as said H. remains in our employ," it was held that by the terms of the guaranty that partner alone, and not the firm, were bound. Avery *v.* Rowell, 59 Wis. 82.

(*t*) 9 Geo. IV., c. 14, § 6. Swift *v.* Jewsbury, L. R., 9 Q. B. 301; reversing Swift *v.* Winterbotham, L. R., 8 Q. B. 244.

**Promise to provide for bill.*—If one partner, in consideration that a person will accept a partnership bill, promises that the firm will put him in funds to meet the bill when due, this promise binds the firm. (*u*) But this is not guaranteeing payment of the debt of another within the rule above discussed. [*139

16. *Insurances.*—One partner can bind the firm by an insurance of the partnership goods. (*v*) And if one insures for all, he may give notice of an abandonment for all. (*x*)[22]

17. *Interest.*—An admission by one partner that a debt of the firm bears interest at a given rate is *prima facie* binding on the firm. (*y*)

See further, *ante*, under the head "*Debts.*"

18. *Judicial proceedings.*—The power of one partner to act for the firm in legal proceedings will be noticed hereafter, when treating of actions (book II., c. 3, § 1), and bankruptcy (book IV., c 2).

19. *Leases.*—One partner, as such, has no authority to contract on behalf of the firm for a lease of a house for partnership purposes. (*z*)

Where a lease is made by several partners jointly, a notice to quit given by one on behalf of all is sufficient. (*a*)[23]

20. *Mortgages and pledges.* a. *By partners.*—A legal mortgage

(*u*) Johnson *v.* Peck, 3 Stark. 66.

(*v*) Hooper *v.* Lusby, 4 Camp. 66. See Armitage *v.* Winterbottom, 1 Man. & G. 130.

(*x*) Hunt *v.* The Royal Exchange Assurance Co., 5 Man. & S. 47.

22. Insurance.—One member of a partnership who are the agents of an insurance company, has all the powers of the firm in making a parol contract of insurance. Kennebeck Co. *v.* Augusta Ins., &c., Co., 6 Gray (Mass.) 204.

When the firm is liable on a note given by one partner in payment of the premium of insurance on property represented by him to be firm property, whether such be the case or not, see Osgood *v.* Glover, 7 Daly (N. Y.) 367.

(*y*) See Fergusson *v.* Fyfe, 8 Cl. & F. 121.

(*z*) Sharp *v.* Milligan, 22 Beav. 606, where, however, specific performance was decreed against the firm, the contract having been ratified by the other partners.

(*a*) Doe *v.* Hulme, 2 Man. & R. 433; Doe *v.* Summersett, 1 B. & Ad. 135; Goodtitle *v.* Woodward, 3 B. & A. 689. See Right *v.* Cuthell, 5 East 491.

23. Leases.—In Penn *v.* Kearney (21 La. Ann. 21) it is held that a partnership may be held jointly liable for rent of premises leased to and in the name of one member only, on proof that they were hired for and used by the firm; while, in Tuttle *v.* Eskridge (2 Munf. (Va.) 330), a lease from one copartner, sealed with his seal, and in terms binding himself only, was held not admissible evidence to support an avowry laying a demise by the copartners, notwithstanding the deed was expressed as "for himself and his partner," and it was proved that the other party knew of the demise and was satisfied with it.

cannot be made of partnership real estate without the concurrence of all the partners. (*b*)

It being, however, decided that a member of an ordinary trading partnership has power to borrow money on the credit of the firm, it follows almost necessarily that he should have power to pledge partnership property as a security for advances. *The writer is not aware of any decision in which an equitable mortgage, made by one partner by a deposit of deeds relating to partnership real estate, has been upheld, or the contrary; he can therefore only venture to submit that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm. (*c*)[24]

*140]

(*b*) See *ante*, heading "Deed." In Juggeewundas Keeka Shah *v.* Ramdas Brijbooken Das, 2 Moo. In. Ap. 407, a mortgage by one partner was, under peculiar circumstances, held to bind the firm.

(*c*) In Re Clough, 31 Ch. D. 324, an equitable mortgage by a surviving partner for a partnership debt was held valid. See, further, Ex parte National Bank, 14 Eq. 507; Patent File Co., 6 Ch. 83; Ex parte Lloyd, 1 Mont. & A. 494. Compare 7 T. R. 210, per Lord Kenyon.

24. Mortgages of land.—The rules relative to the power of one partner to convey firm property by deed (*ante* p. *137, note 20), apply here. Thus, a mortgage under seal, executed by one partner will bind him, but not the firm. Weeks *v.* Mascoma Rake Co., 58 N. H. 101. Such a mortgage, even though given to secure a firm debt, contracted within scope of the partnership business, if not authorized or ratified by his copartners, conveys only his own interest, and may be foreclosed only to that extent. Printup *v.* Turner, 65 Ga. 71. *Contra*, see Chittenden *v.* German Amer. Bank, 27 Minn. 143. See, also, Cottle *v.* Harrold, 72 Ga. 830. But a mortgage given by one partner on the partnership property, under a power of attorney which was ample, is valid. Seawell *v.* Payne, 5 La. Ann. 255.

What amounts to a ratification, see Stroman *v.* Varn, 19 So. Car. 307.

Chattel mortgages.—One partner has authority, without the consent or knowledge of his copartner, to mortgage the whole stock in trade of the firm to secure a particular creditor of the firm. Tapley *v.* Butterfield, 1 Metc. (Mass.) 515. See Willett *v.* Stringer, 17 Abb. (N. Y.) Pr. 152. Thus, he may execute a valid mortgage of a vessel owned by the firm, by signing the individual names of the members of the firm. Patch *v.* Wheatland, 8 Allen (Mass.) 102. The fact that he seals the instrument, a seal being unnecessary, will not affect its validity. Woodruff *v.* King, 47 Wis. 261; Hawkins *v.* Hastings Bank, 1 Dill. (U. S.) 462; S. C., 4 Bankr. Reg. 108.

If the copartner recognizes a mortgage so executed, he is estopped to deny its validity. Richardson *v.* Lester, 83 Ill. 55. See, also, Hawkins *v.* Hastings Bank, *supra*.

But one partner cannot mortgage the individual property of his copartner without his consent or acquiescence, under such circumstances as to create an estoppel. Gates *v.* Bennett, 33 Ark. 311; Cutler *v.* Hake, 47 Mich. 80.

So, also, a chattel mortgage of the stock of a firm to secure a debt which comes

Pledges of chattels.—The implied authority of a partner who has power to borrow to pledge the personal property of the firm for money borrowed is beyond dispute,(*d*) and the power is not confined to cases in which there is a general partnership, for if several join in a purchase of goods to be sold for their common profit, a pledge of those goods by one of the persons interested is binding on them all.(*e*) The implied power to pledge, moreover, extends to pledges for antecedent debts.(*f*)

Redemption.—Any partner may, on behalf of the firm, redeem a pledge of the firm, but he alone is not the proper person to bring an action to recover the thing pledged.(*g*)

Factors' acts.—A question of some importance arises as to the effect, if any, of the Factors' acts(*h*) on the power of one partner to sell and *pledge the goods of the firm. The writer is not aware of any authority upon this subject, but he conceives that those [*141 acts neither extend nor abridge the power in question. The Factors' acts do not apparently render valid any sale or pledge by one partner of partnership goods, which is not valid, independently of the acts, upon the principles of the common law.

b. *To partners.*—One partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm,

due in twenty-four hours after its date, and having the practical effect of terminating the firm business, if enforced, cannot be validly executed by one partner without the assent of the other. Osborne *v.* Barge, 29 Fed. Rep. 725.

(*d*) See, Ex parte Bonbonus, 8 Ves. 540; Butchart *v.* Dresser, 10 Hare 543, and 4 De G., M. & G. 542; Brownrigg *v.* Rae, 5 Ex. 489; Gordon *v.* Ellis, 7 Man. & G. 607. See, also, Langmead's Trusts, 20 Beav. 20, and 7 De G., M. & G. 353, and as to ships, Ex parte Howden, 2 Mont., D. & D. 574.

(*e*) Reid *v.* Hollinshead, 4 Barn. & C. 867; Re Gellar, 1 Rose 297; Raba *v.* Ryland, Gow N. P. 133; Tupper *v.* Haythorne, Id. 135; but see Barton *v.* Williams, 5 B. & A. 395, p. 405, per Best, J., and note that there the goods pledged were not partnership property when the pledge was made. In Ex parte Copeland, 2 Mont. & A. 177, it was questioned whether a pledge by one partner was valid if the pledgee had notice that the pledgor was not the only owner, but this, it is conceived, could only be material where the pledge is not made for ostensible partnership purposes.

(*f*) Patent File Co., 6 Ch. 83; Re Clough, 31 Ch. D. 324; and see Story on Part, § 101.

(*g*) See Harper *v.* Godsell, L. R., 5 Q. B. 422.

(*h*) 4 Geo. IV., c. 83; 6 Geo. IV., c. 94; 5 and 6 Vict., c. 39; 40 and 41 Vict., c. 39. See, upon them, Navulshaw *v.* Brownrigg, 2 De G., M. & G. 441; Kaltenbach *v.* Lewis, 10 App. Cas. 617.

and where one member of a firm of bankers accepted as security for money due to the bank shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his copartners liable as contributories of the company. (*i*)[25]

21. *Notice.*—Questions frequently arise as to whether notice to one partner is notice to all.

General rule.—As a general rule, notice to a principal is notice to all his agents, (*k*) and notice to an agent of matters connected with his agency is notice to his principal. (*l*) Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members; (*m*) and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also, if it relates to the business of that other. (*n*)

*142] **Firm affected by its agent's knowledge.*—In conformity with these principles, if a firm claims the benefit of a trans-

(*i*) Weikersheim's Case, 8 Ch. 831.

25. Pledges.—So, also, one partner may, by way of pledge, without the consent or even knowledge of his copartner, assign directly to a creditor a part or the whole of the partnership property to secure a firm debt existing or about to be contracted. Mabbett *v.* White, 12 N. Y. 442; Harrison *v.* Sterry, 5 Cranch (U. S.) 289; Deming *v.* Colt, 3 Sandf. (N. Y.) 290; Hodges *v.* Harris, 6 Pick. (Mass.) 360; Tapley *v.* Butterfield, 1 Metc. (Mass.) 515; Egberts *v.* Woods, 3 Paige (N. Y.) 517; Cullom *v.* Bloodgood, 15 Ala. 34; McCollough *v.* Sommerville, 8 Leigh (Va.) 415; Ormsbee *v.* Davis, 5 R. I. 443; Russel *v.* Leland, 12 Allen (Mass.) 349. But one partner has no authority to agree that private property of the other partner, pledged by him for a firm debt, shall also stand as security for further advances. Beardsley *v.* Tuttle, 11 Wis. 74. See, also, generally, Miller *v.* Sullivan, 1 Cin. (O.) 271.

(*k*) See Mayhew *v.* Eames, 1 Car. & P. 550, and 3 Barn. & C. 601; Willis *v.* The Bank of England, 4 Ad. & E. 21.

(*l*) Dresser *v.* Norwood, 17 C. B. (N. S.) 466; reversing the decision below, 14 C. B. (N. S.) 574. Per Ashhurst, J., Fitzherbert *v.* Mather, 1 T. R. 16; Le Neve *v.* Le Neve, 1 Ves. & S. 64; Collinson *v.* Lister, 7 De G., M. & G. 634, and 20 Beav. 356. See, generally, on this maxim, Blackburn, Low & Co. *v.* Vigors, 17 Q. B. D. 553. Whether a principal is affected by notice acquired by the agent, but not in that character, is perhaps scarcely yet settled. Dresser *v.* Norwood is a strong authority that in commercial transactions he is.

(*m*) Alderson *v.* Pope, 1 Camp. 404; Porthouse *v.* Parker, Id. 82; Bignold *v.* Waterhouse, 1 Man. & S. 259; and see Salomons *v* Nissen, 2 T. R. 647.

(*n*) See Steele *v.* Stuart, 2 Eq. 84; Porthouse *v.* Parker, 1 Camp. 82; Worcester Corn Exch. Co., 3 De G., M. & G. 180; Jacaud *v.* French, 12 East 317; Powles *v.* Page, 3 C. B. 16.

action entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal. (*o*) Thus, in Collinson *v.* Lister, (*p*) it was held that a banking company was not entitled to the benefit of a mortgage given to it by its own manager, in his character of an executor. For the mortgage was given as a security for money borrowed by the manager as executor, and advanced by himself as manager for improper purposes, and in breach of the trusts which, as executor, he had to perform; and the company, in taking the mortgage, knew that their manager was giving a security on his testator's estate for money previously taken by him from the funds of the company, and which moneys he had been requested to replace or give security for. Under these circumstances, it was treated as clear that the bank could stand in no better position than the manager would have done had he advanced the money himself and taken a mortgage for it from himself.

Meaning of phrase "Notice to one is notice to all."—When it is said that notice to one partner is notice to all, what is meant is (1) that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and (2) that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. The expression means no more than this, and although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members. Where one member is acting beyond his powers, or is committing a fraud on his copartners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by them. (*q*)

*In Bignold *v.* Waterhouse (*r*) one of a firm of carriers entered into an agreement to carry valuable parcels free of charge, but under such circumstances as to render the agreement not [*143

(*o*) See *ante* p. *116, and the cases below.

(*p*) 7 De G., M. & G. 634, and 20 Beav. 356.

(*q*) See the judgment of Jessel, M. R., in Williamson *v.* Barbour, 9 Ch. D. 535, *et seq.*

(*r*) 1 Mau. & S. 255.

binding on the other partners. A parcel, known to the partner who made the agreement to be of value, was sent, but was not entered or paid for as a valuable parcel. The other partners were held to be unaffected with the notice which their copartner had of the nature of the parcel, and were held not to be liable for its loss.

Breaches of trust.—So, if one partner is a trustee and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm, and therefore, to affect the other partners with a breach of trust, further evidence must be adduced. (*s*)

Notice to clerks.—Moreover, in cases of this kind, notice on the part of the clerks of the firm of what the fraudulent partner is doing is no more than notice to him; it is not sufficient to affect his copartners. (*t*)[26]

Ratification.—These cases show what indeed is obvious of itself, viz., that if a partner exceeds his authority, and it is contended that the firm is bound by what he has done, on the ground that it has ratified his acts, evidence must be given to prove that at the time of the alleged ratification his copartners knew of those acts. It would be absurd if, in such a case, knowledge by him was equivalent to knowledge by them. (*u*)[27]

(*s*) See Ex parte Heaton, Buck 386.

(*t*) See Lacey *v.* Hill, 4 Ch. D. 537, and Williamson *v.* Barbour, 9 Ch. D. 536.

26. **Notice to one partner.**—The general rule is that notice to one partner, in reference to a partnership transaction, is notice to all the partners. Fitch *v.* Stamps, 7 Miss. (6 How.) 487. Thus, notice to one of the copartners, who have separately signed articles of submission to arbitration, is notice to the firm. Haywood *v.* Harmon, 17 Ill. 477. And where property is purchased by a partnership, notice to one is notice to all the partners; yet, if one of two persons, about entering into partnership, purchase of the other an undivided interest in property owned by him, to be held by the two for the use of the firm, this principle, as to notice, does not apply. Herbert *v.* Odlin, 40 N. H. 267. See, also, Barney *v.* Currier, 1 D. Chip. (Vt.) 315.

So, where a transfer of a note is made to a firm one of whose members is a trustee of the company owning the note, the firm has constructive notice of want of authority in the company to make the transfer. Smith *v.* Hall, 5 Bosw. (N. Y.) 319. And where a bill is drawn by one and accepted by the other, of two firms, having one common partner, formal notice of protest to the acceptors is not necessary. Woodbury *v.* Sackrider, 2 Abb (N. Y.) Pr. 402.

But notice to a firm cannot affect a member thereof in his individual rights or interests disconnected with those of the firm. Boling *v.* Anderson, 60 Tenn. 551. See, also, Aultman & Taylor Co. *v.* Webber, 4 Ill. App. 427.

(*u*) See acc. the last note.

27. **Ratification.**—When one of two

A retired partner is not affected with notice on the part of the continuing partners of what has occurred since the partnership, if the

partners receives money on an executory contract and the other partner subsequently ratifies the contract, both are liable, if the contract is not fulfilled, though the money may have been paid over from one partner to the other. Lawrence *v.* Taylor, 5 Hill (N. Y.) 107. So, a promissory note executed by one partner after dissolution, if ratified by the other, will be binding upon the firm. Carter *v.* Pomeroy, 30 Ind. 438.

What amounts to ratification.—To constitute a ratification, by one partner, of the independent act of the other, *e. g.*, the use, after dissolution, of the firm name, in the renewal of a partnership note, there must be some act on the part of the non-acting partner fairly implying a willingness to affirm what has been done. Hatton *v.* Stewart, 2 Lea (Tenn.) 233. The endorsing on a note guaranteed by one partner in the firm name, of a waiver of notice, protest, &c., for the purpose of saving expense, cannot be considered a ratification or adoption of the unauthorized act of the partner in making such guaranty; nor is the failure to make prompt denial of firm liability, on such note being presented for payment, sufficient to establish a ratification or admission of liability. Marsh *v.* Thompson Nat. Bank, 2 Bradw. (Ill.) 217. But the reception of goods purchased without authority for persons about to enter into partnership, in their name and on their credit as partners, and their disposal of them for their own purposes, after being informed as to how the goods were purchased, is a ratification. Pike *v.* Douglass, 28 Ark. 59. And where it is shown that one member of a firm employed an attorney in a matter not strictly partnership business, but done in the interest of the firm, and it is also shown that his copartner paid the attorney money towards his expense in that business, with knowledge of its nature, that amounts to a ratification, and binds him equally with the other member of the firm for the payment of the attorney's fees in that business. Holmes *v.* Kortlander, 31 N. W. Rep. (Mich.) 532.

Where a member of a firm drew a check in the firm name, in favor of a bank to which he was individually indebted, and the other members, within a month, had knowledge of the misapplication of the check to his private account, but omitted to repudiate the act till four years afterward, when the firm brought suit for the money, such omission was held to be tantamount to a ratification, and to bar recovery. Marine Co. *v.* Carver, 42 Ill. 66. See, also, Waterman *v.* Dutton, 6 Wis. 265.

Where a partner said he would settle a note which was signed in the firm name, but which was not given for partnership purposes, "if he could get the books, notes and accounts from" the partner who signed the note, it was held that he did not become liable on the note, especially as the condition of this promise never happened. Burleigh *v.* Parton, 21 Tex. 585.

Knowledge and silence, when a ratification.—To remain silent, after discovering that one partner has used the firm name for purposes outside the firm business, is evidence of assent, prior or subsequent, but not conclusive as matter of law. Ferguson *v.* Gordon, 1 Sneed (Tenn.) 254.

Although the engagement of an individual member of a firm may not be within the scope of the partnership dealings, yet if the transaction come within the knowledge of his copartners, and if assented to by them, then it will be obligatory upon the concern. McNeill *v.* Reynolds, 9 Ala. 313.

agency subsisting between them has been dissolved.(*x*) Nor is an incoming partner affected with notice of what occurred before he joined the firm.(*y*)

22. *Payments.*—See *ante*, under the head "*Debts.*"

23. *Penalties.*—One partner may bind the firm under a *penalty
*144] to observe a contract which he is authorized to enter into on its behalf.(*z*)

Upon trial of a case involving the extent of a water privilege claimed by copartners under an alleged appropriation, their notice of location, shown to have been prepared with the knowledge of some of them, and seen by them as a posted notice, and to have been so posted that it "must have been seen" by the others, was held admissible in evidence as part of the *res gestæ*. McKinney *v.* Smith, 21 Cal. 374.

Where a member of a partnership had endorsed his own note with the name of the firm, for his own exclusive benefit, without authority from the other copartner, and the endorsee took the note with full knowledge of the facts, it was held that no independent consideration was required to support a subsequent ratification and promise, by the second copartner, to pay the note. Commercial Bank *v.* Warren, 15 N. Y. 577.

Thus, where a note was given by one partner for money used by the firm in its business, and the amount thereof was entered in the firm books as an indebtedness of the firm, which books were examined from time to time by a partner denying the execution of a note by him—*Held*, that if he was informed of the making of the note, and made no objection, he was estopped from denying its validity. Kitner *v.* Whitlock, 88 Ill. 513.

But the mere fact that the other members of the firm have knowledge that one partner has given a firm note, will not be construed to impute to them knowledge that the note was a fraud upon them, and until such knowledge of the fraud has been brought home to them, the firm cannot be held to have ratified the transaction. Hayes *v.* Baxter, 65 Barb. (N. Y.) 181.

Nor does the mere fact that one partner, on being informed that the other partner has given a firm note for his individual debt, does not deny his liability thereon, amount, *per se*, to a ratification or adoption of the note, though it may be a circumstance tending to show assent. Reubin *v.* Cohen, 48 Cal. 545.

Where one partner of a firm, without the knowledge or assent of the other, subscribed for certain stock in the firm name, the omission of the other partner to express his dissent to such subscription, when demand of payment for the stock was made of the firm, does not make him a stockholder or render him liable to pay for stock so subscribed for. Barnard *v.* Lapeer, 6 Mich. 274.

Ratification, how proved.—Ratification of a partner's authority to bind the firm as sureties upon a note, may be proved by circumstantial evidence (First Nat. Bank *v.* Breese, 39 Iowa 640); and it is the province of the jury to judge of the extent of it, and error for the court to rule upon the point as a question of law. Noble *v.* M'Clintock, 2 Watts & S. (Pa.) 152.

(*x*) Adams *v.* Bingley, 1 Mees. & W. 192.

(*y*) See per Jessel, M. R., in Williamson *v.* Barbour, 9 Ch. D. 536.

(*z*) Beckham *v.* Drake, 9 Mees. & W. 79.

24. *Purchases.*—It has been long decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way.(*a*) This cannot be more strongly exemplified than by the case of Bond *v.* Gibson.(*b*) There two persons carried on business as harness makers. One of them bought, on the credit of the firm, a number of bits to be made up into bridles, but instead of using the bits for the partnership business, he pawned them for his own use. The seller of the bits was nevertheless held entitled to recover their price in an action against both partners.

Goods supplied to one partner.—The firm is liable, although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm.(*c*) But, as will be seen hereafter, the firm is not liable for goods ordered by and supplied to one partner, and which it was his duty to contribute to the joint stock of the firm.(*d*)

Non-trading partnerships.—The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus, where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work and became bankrupt, the printers were held liable for its price to the stationers who supplied it.(*e*) It is of no consequence what the partnership business may be, if the goods supplied are necessary for its transaction in the ordinary way.

Return of goods.—If goods are sold to a firm on credit and are delivered to the firm, and then one partner returns them, the firm not being able to pay for them, the property will be vested in the vendor, *subject, in the event of bankruptcy, to the question of fraudulent preference.(*f*)[28] [*145

(*a*) Hyatt *v.* Hare, Comb. 383.

(*b*) 1 Camp. 185.

(*c*) Ruppell *v.* Roberts, 4 Nev. & M. 31; City of London Gas Co. *v.* Nicholls, 2 Car. & P. 365; Gardiner *v.* Childs, 8 Id. 345.

(*d*) See book II., ch. 2, § 3. Greenslade *v.* Dower, 7 Barn. & C. 635, and cases of that class.

(*e*) Gardiner *v.* Childs, 8 Car. & P. 345; compare Wilson *v.* Whitehead, 10 Mees. & W. 503.

(*f*) De Tastet *v.* Carroll, 1 Stark. 88.

28. **Purchases by one partner, generally.**—The general rule is that partners are all liable for goods furnished for the use of the firm, though the vendor supposed himself dealing with, and giving credit to, an individual partner, not knowing of the existence of the firm. Reynolds *v.* Cleveland, 4 Cow. (N. Y.) 282; Roth *v.* Moore, 19 La. Ann. 86; Bracken *v.* March, 4 Mo. 74; Tucker *v.* Peaslee, 36 N. H. 167;

25. *Receipts.*—See, *ante*, under the head "*Debts.*"

26. *Releases and covenants not to sue.*—A covenant by one partner not to sue for a partnership debt does not amount to a release of that

Baxter *v.* Clark, 4 Ired. (N. C.) L. 127; Given *v.* Albert, 5 Watts & S. (Pa.) 333; Bisel *v.* Hobbs, 6 Blackf. (Ind.) 479; Griffith *v.* Buffum, 22 Vt. 181. But, see Watt *v.* Kirby, 15 Ill. 200; Sinklen *v.* Lambert, 5 Phil. (Pa.) 36.

Partners in purchases are affected by the knowledge of either of them, and the interest of both must share the same fate. Sanders *v.* Ruddle, 2 T. B. Mon. (Ky.) 139.

If there be an agreement of partnership, common or special, for the purpose of purchasing property at certain sales, all the purchases made at such sales by either of the partners will be considered as made on the partnership account, although the advances by one exceed those of the other. Taylor *v.* Taylor, 2 Murph. (N. C.) 70.

When a partnership have entered a credit for an article bought by one partner in his private capacity, the vendor has a right to look to the partnership for payment. Dishon *v.* Schorr, 19 Ill. 59.

If a partner purchase goods in the name of the firm, although he applies them to his individual use, the partnership is liable for the price to the vendor. Dickson *v.* Alexander, 7 Ired. (N. C.) L. 4; Venable *v.* Levick, 2 Head (Tenn.) 351.

Where goods are sold to a firm with the understanding that they are to be paid for in gold coin, and on the day after suit is commenced for the price of the goods such understanding is reduced to writing and signed by one of the partners in the name of the firm, and the complaint brings the case within the Specific Contract act, judgment should be rendered payable in gold coin. Meyer *v.* Kohn, 29 Cal. 278.

Authority to a firm to receive goods is not extended to a new firm, formed after dissolution of the original one from a part of the members thereof. Angle *v.* Mississippi, &c., R. R. Co., 9 Iowa 487.

In a suit against partners in a distillery and in the purchase of corn, the plaintiff may give in evidence the receipt of one of the defendants, acknowledging the delivery of a certain quantity of corn to him by the plaintiff. Bisel *v.* Hobbs, 6 Blackf. (Ind.) 479.

A partnership is liable for lumber purchased by and charged to one of the partners, where it was purchased for partnership purposes. Braches *v.* Anderson, 14 Mo. 441. See, also, Mead *v.* Shepard, 54 Barb. (N. Y.) 474; Haskinson *v.* Eliot, 62 Pa. St. 393.

Wherever the original credit was given to the partnership, that will constitute a debt against the partnership, notwithstanding the partner contracting the debt may have given his own separate security, or made himself personally liable therefor. Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430.

A copartner may contract on his own account, and make himself alone liable for merchandise bought for the copartnership account, if the vendor choose to accept him. Sylvester *v.* Smith, 9 Mass. 119.

In *assumpsit* against partners, under the common counts, proof of a promise by one in the name of the firm is not sufficient; there must be proof of a joint promise, or of the existence of the partnership. Findlay *v.* Stevenson, 3 Stew. (Ala.) 48.

A demand of payment of, and refusal by one partner, for goods furnished to the firm, binds the other. Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 178.

In an action upon a guaranty of payment of a note for the purchase money of

debt by the firm,(*g*) although a covenant by all the partners not to sue would be equivalent to a release,(*h*) and a release by one partner operates as a release by the firm.(*i*)

a steamboat, involving the question of delivery—*Held*, that a transfer by bill of sale and delivery to only one member of a firm, was to the firm, and not to the individual—the evidence showing that it was in accordance with and fulfillment of the original contract of purchase made by both members of the firm. Byington *v.* Gaff, 44 Ill. 510.

Goods not dealt in by the firm.—When one partner purchases goods not connected with the known business of the firm, although in the firm name, such purchases will not bind the firm in the absence of an express or implied authority, or a subsequent ratification. Bankhead *v.* Alloway, 6 Coldw. (Tenn.) 56. But though the purchase is one outside of the firm's ordinary operations, yet if made for its benefit and brought to the knowledge of the other partner, who does not repudiate it, but promises to pay the note given in the firm name for the price, he will be bound; and this without the written memorandum required in the case of a promise to pay the debt of a third person. Succession of Arick, 22 La. Ann. 501.

Purchases of real estate.—A large number of persons associated together by agreement in writing, for the purpose of trade, to be conducted by the direction of a board of managers, a part of whose duty was "to provide a store for the company." *Held*, that the managers had power to purchase a store and land whereon to place it, and to give the notes of the company to secure the payment of the consideration. Beaman *v.* Whitney, 20 Me. 413.

One of two partners purchased land, and gave a note for the consideration in the partnership name, taking a deed running to both, but without the knowledge or assent of the other partner. The transaction was wholly out of the line of the business of the partnership, and known to be so by the payees. Afterwards, both partners joined in a bond to convey the same land, the partner not assenting to the said conveyance, disclaiming in the bond any interest in the land, and declaring the execution of the bond to be for the benefit of his copartner, and that he would receive none of the profits arising from the transaction. *Held*, that he had so confirmed the doings of his partner as to be holden on the note. Dudley *v.* Littlefield, 21 Me. 418. See, also, Davis *v.* Cook, 14 Nev. 265.

Purchases in violation of stipulations in partnership articles.—While goods are bought by one partner in violation of the articles, yet, if they come to, and are used by, the partnership, the firm is liable. Johnson *v.* Bernheim, 76 N. C. 139.

Thus, where the managing partner buys goods on time, when he ought, according to the partnership articles, to have bought for cash, the firm and each member thereof (out of his individual estate) is liable for the debt, even though the seller had knowledge of the stipulation against credit; and this whether the partner sought to be charged derived any individual advantage from the enterprise or not. Johnson *v.* Bernheim, 86 N. C. 339.

Selling to one who is a partner in two firms.—K. and M. were partners in the hotel business; K. and P. were partners

(*g*) Walmsley *v.* Cooper, 11 Ad. & E. 216.
(*h*) Deux *v.* Jefferies, Cro. Eliz. 352.
(*i*) 2 Ro. Ab., "Release," 410, D; Hawkshaw *v.* Parkins, 2 Swanst. 539.

Setting aside bona fide releases by one partner.—This last proposition, viz., that a release by one partner is, in point of law, a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a copartner without his consent.

In Furnival *v.* Weston(*k*) the members of a firm sued the defendant for a libel on the firm published by him. One of the partners, without the consent of the others, released the defendant, and there being no fraud in the case, the court refused to set the release aside. In Arton *v.* Booth(*l*) the two plaintiffs, Arton and Dawson, had been partners, but they had dissolved partnership, and it was agreed between them that Arton should get in the debts of the firm, and that

in the grocery business; it was doubtful whether either had a well-settled firm name, and there was evidence that each sometimes used and recognized the name of K. & Co. *Held*, that one selling goods to K., and taking reasonable care to ascertain for which firm K. was dealing, and believing that firm to be K. and M., and the goods being adapted to the business of that firm, could hold that firm for the price of the goods. Baker *v.* Nappier, 19 Ga. 520.

Notice not to sell to partner making the purchase.—A sale of goods on credit to one partner, in the course of the business of the partnership, is a sale to the firm, unless it be made contrary to an express notice by the other partner not to trust the firm on his account, in which case he alone will be liable who made the purchase, and an action to recover the price cannot be maintained against the firm. Feigley *v.* Sponeberger, 5 Watts & S. (Pa.) 567.

Furnishing goods to third person on request of one partner.—In Pinckney *v.* Keyler (4 E. D. Smith (N. Y.) 469) it is held that to bind a partnership to the payment for goods delivered to third persons it is not enough to show that one of the partners requested the furnishing of the goods to such third persons. But in Cameron *v.* Blackman (39 Mich. 108) it is said that judicial notice is taken of the mercantile custom of mutual credits under which business establishments furnish each other's clerks or customers with goods and charge them to each other. It is within the authority of the managing partner to authorize such dealings, and when so authorized they are binding until notice to the contrary.

Where one who boarded hands in the employ of a partnership was authorized by a partner to take up goods on account of the firm, for his family use in that business, and, on his representation to that effect, goods were furnished him on the credit of the firm, though, for convenience merely, charged in the first instance to him, and afterwards transferred to the account of the firm—*Held*, that the firm was liable therefor, and that he was a competent witness for the plaintiffs, to show the liability; *a fortiori* if he were a partner as well as an agent. Scott *v.* Shepherd, 3 Vt. 104.

(*k*) 7 Moore 356.

(*l*) 4 Moore 192. See, too, Jones *v.* Herbert, 7 Taunt. 421, and compare Barker *v.* Richardson, 1 You. & J. 362, stated lower down.

Dawson should not interfere with him. The defendant was sued for a debt owing to the plaintiffs, and after action brought Dawson released him on receiving payment. Although the release deprived the plaintiffs of their costs, the court would not interfere, as no case of fraud was made out. So, in Phillips *v.* Clagett,(*m*) where partners brought an action against the defendant for illegally pledging their property, the court gave him leave to plead a release previously given by one of the partners.

Setting aside fraudulent releases.—However, if it can be shown that one partner has, in fraud of his copartners and in collusion with the defendant, executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defence to an action against him. Thus, in Barker

*146] *v.* Richardson,(*n*) the plaintiffs, Barker and Owen, had been partners, but they had dissolved partnership, and it was agreed that Barker should get in the debts owing to the firm, and, if necessary, sue for the same. The defendant was indebted to the firm, and had notice of the above agreement. He was also a creditor of Owen on a private account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and after the commencement of the action by Barker for the recovery of that debt, gave the defendant a formal release. The evidence showed that the release was given to defeat the action—to prevent Barker from recovering the debt due to the firm—and as part of a scheme for discharging Owen's private debts to the defendant. Under these circumstances, the release was not allowed to be pleaded.[29]

27. *Representations and statements.*—The firm is bound by all representations made by a partner whilst acting within the scope of his

(*m*) 11 Mees. & W. 84.

(*n*) 1 You. & J. 362. See, too, Aspinall *v.* The London and N. W. Rail. Co., 11 Hare 325; Phillips *v.* Clagett, 11 Mees. & W. 84.

29. Releases given by one partner.—Although, in general, one partner cannot bind the other by deed, yet one partner may sign and seal a *release* which will be binding on the firm, of a debt due to the partnership. Halsey *v.* Whitney, 4 Mason (U. S.) 206, 231; United States *v.* Astley, 3 Wash. (U. S.) 508. So, also, a release of one partner discharges his copartner also. Gray *v.* Brown, 22 Ala. 262. And a release of errors by one partner will bind his copartner. Wood *v.* Goss, 21 Ill. 604.

But in Beatson *v.* Harris (60 N. H. 83) it is held that a release of a suit by one of two partners, by connivance with defendant, is void. See, also, South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561.

real or implied authority, and having reference to the business of the firm;(*o*) but not by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant.(*p*)

The liability of partnerships for false and fraudulent representations will be discussed in the next section of this chapter.[30]

(*o*) Rapp *v.* Latham, 2 B. & A. 795; Blair *v.* Bromley, 2 Ph. 354; Wickham *v.* Wickham, 2 Kay & J. 478.

(*p*) Ex parte Agace, 2 Cox 312.

30. Representations and statements by one partner.—To an action brought by three partners for an indebtedness to the firm, defendants pleaded that two of the partners had represented to defendants that they alone composed the firm, and upon the strength of such representations the indebtedness sued for was contracted. *Held*, that such plea could not defeat the action, where the third partner neither authorized nor knew of such misrepresentations. Rush *v.* Thompson (Ind.), 13 N. E. Rep. 665.

Representations by a member of a firm to the payees and endorsees of notes of the firm, without knowledge that the notes were tainted with usury, that the debt represented by the notes was all right and would be promptly paid, are binding on the firm, and estop them from setting up usury in defence to a suit on the notes. French *v.* Rowe, 15 Iowa 563.

Where one of a firm makes representations that certain flour was bought on account of a third person, and that the firm's interest is limited by the amount advanced by them in making the purchase, the firm cannot assert their ownership, as against one who has purchased of said third person. Bemis *v.* Becker, 1 Kan. 226.

The general rule that where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated, is not applicable to the case of partners, who are responsible for each other's statements in regard to their joint transactions. Cook *v.* Castner, 9 Cush. (Mass.) 266.

A declaration by a surviving partner that the partnership owed the deceased a certain sum, may be proved, to show that there was an account stated with the deceased in his lifetime. Cunningham *v.* Sublette, 4 Mo. 224.

Where one of two partners makes fraudulent representations, whereby goods are obtained and consigned to his partner, replevin in the *cepit* lies against both. Olmsted *v.* Hotailing, 1 Hill (N. Y.) 317.

A partner sold certain promissory notes belonging to the firm, for the benefit of the firm, stating to the purchaser that they were good notes and would be paid, that the endorser was worth a certain sum, and the maker another certain sum, which representations were false. *Held*, that the firm were bound by the representations of the partner, and an action on the warranty might be maintained against all the members. Sweet *v.* Bradley, 24 Barb. (N. Y.) 549.

The declaration of a partner after he had purchased a chattel, that he had bought it for the firm, is not sufficient nor competent evidence to render a copartner liable. White *v.* Gibson, 11 Ired. (N. C.) L. 283.

The declarations of a partner, not a party to the suit, are not competent evidence of a partnership. Martin *v.* Kaffroth, 16 Serg. & R. (Pa.) 120.

The acts and declarations of a partner

See further on this subject, *ante*, under the head "*Admissions.*"

28. *Sales.*—Any partner can dispose of any of the partnership goods, (*q*) and in one case it was even held that he could make a valid sale of the partnership books. (*r*)

If by any event the partners become mere tenants in common of the partnership goods, and one assumes to sell them, the purchaser, although he may only become tenant in common with the other partners, will nevertheless, if he gets possession of the goods, be able to retain them as against his cotenants, for no action lies by one tenant in common against another for the recovery of the goods belonging to both. (*s*)

*The question whether a partner's power to sell is in any way affected by the Factors' acts has already been noticed. (*t*)[31] [*147

may be given in evidence to prove his assent to the junction of his firm with the firm of a third person; also the conduct of the third person's firm. Wood *v.* Connell, 2 Whart. (Pa.) 543.

(*q*) Lambert's Case, Godb. 244.

(*r*) Dore *v.* Wilkinson, 2 Stark. 287.

(*s*) Litt., § 323; Fox *v.* Hanbury, Cowp. 445; and see Buckley *v.* Barber, 6 Ex. 182; *ante* p. *61.

(*t*) *Ante* p. *140.

31. Sales by one partner, generally.—Each partner has complete control over and power of disposal of the partnership property for the purposes of the business. The fact that the firm property consists of ships does not alter the rule. Lamb *v.* Durant, 12 Mass. 54.

He has a right to sell goods belonging to the firm, to be paid for by personal property, which is to be delivered only on his own order. McBain *v.* Austin, 16 Wis. 87.

If A be a silent partner with B, he is the only person who can object to the validity of a sale by B alone, of goods owned in common by them as partners. Derby *v.* Gallup, 5 Minn. 119. And see Birks *v.* French, 21 Kan. 238.

While one partner may bind the other by a sale of the good will of the business, he cannot bind his partner, by a contract, not to go into the same business. Morean *v.* Edwards, 2 Tenn. Ch. 347.

In Louisiana, the mere fact that one member of an ordinary planting partnership is entrusted with the management of the plantation will not authorize him to make a *dation en paiement* of certain property of the firm to one of its creditors, and thus place the interest of his copartner in such property beyond the reach of the other creditors of the firm. Bass *v.* Messick, 30 La. Ann. 373.

Sale of entire stock in one transaction.—The principle is settled that a sale of all the goods of a mercantile partnership, at once, is in the course of trade, and a fair sale of all, by a single contract, by one partner is within the implied powers incident to the partnership relation. Ellis *v.* Allen (Ala.), 2 So. Rep. 676. S. P., Arnold *v.* Brown, 24 Pick. (Mass.) 89.

Fair dealing between partners requires that before one undertakes to sell the entire stock, either for cash or in payment of a debt, he should consult the other, if conveniently accessible, no sudden, imperative exigency arising. The other may protect himself by forbidding the sale, or dissenting before it is complete; and if it is consummated without notice to

29. *Servants.*—One partner has implied authority to hire servants to perform the business of the partnership, (*u*) and the writer pre-

him, and works any wrong or injury to him, he may obtain relief in equity; but if he acquiesces in it or declines to enforce his equitable rights, a partnership creditor cannot assail it except on grounds which would avoid a sale by the partnership. Ellis *v.* Allen, *supra.*

If the sale was made subject to the condition that the other partner should assent to it, his assent or subsequent ratification must be shown; but such assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances. Ib.

Such sale may be made notwithstanding the protest of the other partner (Graser *v.* Stellwagen, 25 N. Y. 315); but the purchasers at such a sale, with knowledge of the circumstances, purchase at their peril. Williams *v.* Roberts, 6 Coldw. (Tenn.) 493.

A purchaser in good faith, at such a sale, does not become a tenant in common with the other partner, but acquires title to the whole. Crites *v.* Wilkinson, 65 Cal. 559.

Such a sale dissolves the partnership, although the term for which it was formed has not expired (Whitton *v.* Smith, 1 Freem. (Miss.) Ch. 231; Deckard's Case, 5 Watts (Pa.) 22; but see Kimball *v.* Hamilton, &c., Ins. Co., 8 Bosw. (N. Y.) 495); and the fact that it is made on Sunday will not invalidate it, it not being in the usual business of sales, and being a work of necessity. Schneider *v.* Sansom, 62 Tex. 201; S. C., 50 Am. Rep. 521.

When the partnership is not strictly a trading one, such unauthorized sale, in the temporary absence of the other partner, is not valid as against the latter, but is binding upon the partner making the sale, and he thereby disposes of all his interest in the joint property of the partnership. Blaker *v.* Sands, 29 Kan. 551.

Under Cal. Civ. Code, § 2430, subd. 3, providing that a partner, as such, has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," a stallion kept for breeding purposes is not merchandise. Myers *v.* Moulton, 12 Pac. Rep. 505.

Sale of partner's undivided interest. —One partner cannot sell or mortgage his undivided interest in a specific part of the property belonging to the partnership. Lovejoy *v.* Bowers, 11 N. H. 404.

A member of a copartnership sold and assigned to another "all his interest in and to the property, goods, wares and merchandise and debts belonging to the firm." *Held*, that a debt owing by himself to the firm did not pass by the assignment, the interest of the assignor being only what remained over and above the amount of his indebtedness to the firm. Van Scoter *v.* Lefferts, 11 Barb. (N. Y.) 140.

Sale by partner to pay individual debt. — The rule is well settled that although one partner can transfer the property of the firm to its creditors in discharge of its indebtedness, he cannot apply the partnership property, funds or securities to the discharge of his own private debt without the consent of the other partners, either express or implied. Caldwell *v.* Scott, 54 N. H. 414; Hyrschfelder *v.* Keyser, 59 Ala. 338; Stegall *v.* Coney, 49 Miss. 761; Geery *v.* Cockroft, 33 N. Y. Super. Ct. 147; Williams *v.*

(*u*) Beckham *v.* Drake, 9 Mees. & W. 79. A servant of the firm is a servant of each of the partners, and may be described accordingly in an indictment for stealing the separate property of one of the partners. R. *v.* Leeds, 3 Stark. 70.

sumes that one partner has also implied authority to discharge them, although he cannot do so against the will of his copartners. (*x*) [32]

Barnett, 10 Kan. 455; Post *v.* Kimberly, 9 Johns. (N. Y.) 470. See, also, *infra*, p. *172 and note —, where this subject is more fully examined.

But if such sale be made to a *bona fide* purchaser, and the money received is misapplied, the other partner cannot follow the goods in the hands of such purchaser (Chipley *v.* Keaton, 65 N. C. 534); nor can he maintain an action of any kind against him. Wells *v.* Mitchell, 1 Ired. (N. C.) L. 484. See, also, Stokes *v.* Stevens, 40 Cal. 391; Corwin *v.* Suydam, 24 Ohio St. 209.

The act of a partner in selling goods raises an implied promise on the part of the vendee to pay the partnership for them, subject, however, to be controlled by any express contract which may have existed to the effect that the vendee was not to pay the partnership, but to credit the amount of the goods on an individual claim against the partner who sold the goods, in favor of the vendee. Broaddus *v.* Evans, 63 N. C. 633; Ramey *v.* McBride, 4 Strobh. (S. C.) 12.

Sale of land by one partner.—The mere fact that persons are mercantile partners does not empower one of them to execute an agreement for the sale of real estate in the name of both. McWhorter *v.* McMahan, 1 Clarke (N. Y.) Ch. 400.

Where real estate is conveyed to a firm, or to the members thereof in trust for the firm, the partners become tenants in common of the estate, and neither of them can alone convey more than his undivided interest therein. Anderson *v.* Tompkins, 1 Brock. (U. S.) 456; Willey *v.* Carter, 4 La. Ann. 56; Weld *v.* Peters, 1 Id. 432; Arnold *v.* Stevenson, 2 Nev. 234; Donaldson *v.* Bank of Cape Fear, 1 Dev. (N. C.) Eq. 103.

If the object of a partnership is to purchase, improve, and own a certain tract of land, neither partner has any implied power to alienate any part of the land. The power to create a debt and convey the land in payment cannot be implied from the power to convey in payment of a debt previously contracted by one partner, in the exercise of an undoubted power. Berry *v.* Folkes, 60 Miss. 576.

But a contract to convey lands belonging to a firm, signed with the firm name by one partner, under a verbal authority from the other partner, is binding on both. Lawrence *v.* Taylor, 5 Hill (N. Y.) 107. And inasmuch as a surviving partner is charged with the payment of the debts of the firm, he has the right in equity to dispose of its real estate for that purpose; and although his deed will not convey the legal estate to a purchaser, yet it will convey the equity to him, and through it he may compel the heir to convey the legal title. Andrews *v.* Brown, 21 Ala. 437. See, also, Paton *v.* Baker, 62 Iowa 704.

(*x*) Donaldson *v.* Williams, 1 Cromp. & M. 345. But see Dixon on Part. 139, *contra*.

32. Servants.—Where one of two partners employs a laborer or other employee about the business of the firm, the whole firm is liable for his wages, whatever agreement may subsist between the partners. Coons *v.* Renick, 11 Tex. 134. S. P., Bodwell *v.* Eastman, 106 Mass. 525. And such a contract for services binds the firm even after the admission of a new member into the firm. Froun *v.* Davis, 97 Ind. 401. See, alse, Beste *v.* Creditors, 15 La Ann. 55; Moister's Appeal, 74 Pa. St. 166.

As to the power of the sole acting partner to dismiss employees, as against the power of the dormant partners to re-

30. *Ships.*—Where necessary, one partner may bind the firm by chartering a ship on its behalf, and one partner may mortgage a ship belonging to the firm. (*y*)

SECTION III.—LIABILITY OF PARTNERS IN RESPECT OF TORTS AND FRAUDS.

Liability of principals for the torts and frauds of their agents.—If it were necessary, in order that one person should be liable for the tort or fraud of another, that the former should have authorized the commission of such tort or fraud, it would be a comparatively easy matter to determine in any particular case whether a tort or fraud committed by an agent could or could not be imputed to his principal. But as a principal is bound, not only by the authorized acts of his agent, but also by such unauthorized acts as fall within the scope of the authority apparently conferred upon him, the question whether a tort or fraud committed by an agent is or is not imputable to his principal becomes one of considerable difficulty; for it is obvious that it does not follow from the circumstance that such tort or fraud was not authorized, that therefore the principal is not legally responsible for it. (*z*)

*148] *General principles.*—In order that responsibility may attach to the principal, in respect of a tort or fraud, it is necessary—

1. That he shall have authorized it in the first instance; or,

2. That it shall have been done on his behalf and he shall have ratified it; (*a*) or,

3. That it shall have been committed for his benefit by the agent in the course and as part of his employment. (*b*)

tain them, see Briggs *v.* Smith, 4 Daly (N. Y.) 110.

(*y*) See, as to chartering, Thomas *v.* Clarke, 2 Stark. 451, and, as to mortgaging, Ex parte Howden, 2 Mont., D. & D. 574. The circumstance that a person is registered as a part owner, does not, *per se*, render him liable for the acts of the other owners. Myers *v.* Willis, 17 C. B. 77, and 18 Id. 886; Brodie *v.* Howard, 17 C. B. 109.

(*z*) Pollock on Torts 63, *et seq.*; Story on Agency, § 452; Paley on Agency 294, *et seq.*

(*a*) Ratification can only be of an act done for the person ratifying. Wilson *v.* Tumman, 6 Man. & G. 236.

(*b*) As to the meaning of this expres-

That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants; (*c*) litigants for irregularities committed by their solicitors in the course of the litigation to conduct which they are retained; (*d*) merchants for frauds committed by their factors and brokers whilst acting on their behalf; (*e*) and shopkeepers for the illegal acts of their shopmen whilst in the shop and attending to its business. (*f*)

Exceptions to the rule "Respondeat superior."—On the other hand, a principal is not liable for the torts or frauds of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the willful acts of his agent if not done in the course of his employment and as part of his business; (*g*) and this is true not only of assaults, batteries, libels and the like, but also of frauds. The maxim "*Respondeat superior*" does not render a principal liable for the frauds of his agent if the agent has been dealt with as a principal, (*h*) nor unless the frauds have been committed by the agent for the benefit of his principal and in the course and as part of his own employment. (*i*)

Further, a principal is not bound by a contract which is a *fraud on him, and is known to be so by the person entering into the contract. (*k*) [33] [*149

sion, see Burns *v.* Poulsom, L. R., 8 C. P. 563; Pollock on Torts 72, *et seq.*

(*c*) See the last case, and Patten *v.* Rea, 2 C. B. (N. S.) 606.

(*d*) Collett *v.* Foster, 2 Hurlst. & N. 356.

(*e*) Hern *v.* Nichols, 1 Salk. 289.

(*f*) Grammar *v.* Nixon, 1 Str. 653; Amory *v.* Delamirie, Id. 505.

(*g*) McManus *v.* Crickett, 1 East 106; Croft *v.* Alison, 4 B. & A. 590; Attorney-General *v.* Siddon, 1 Cromp. & J. 220. Compare Limpus *v.* Lon. Gen. Om. Co., 1 Hurlst. & C. 526.

(*h*) Ex parte Eyre, 1 Ph. 227.

(*i*) Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 Id. 104.

(*k*) British and American Tel. Co. *v.* Albion Bank, L. R., 7 Ex. 119; Phosphate of Lime Co. *v.* Green, L. R., 7 C. P. 43, and see, as to the effect of having benefited by such a contract, Id., p. 55.

33. **Liability of principal for torts and frauds of agent.**—The members of a firm are individually liable, in actions of tort, for the acts of the firm, their agents and servants, and for such acts may be sued individually. Stockton *v.* Frey, 4 Gill (Md.) 406. Thus, all the partners are liable for an injury occasioned by the negligence of one of them, or of servants employed by the partnership, while transacting the business of the firm. Linton *v.* Hurley, 14 Gray (Mass.) 191. And the assent of one of two partners to what is being done by a person acting as a deputized constable in the service of an execution in favor of the firm, is sufficient to bind both. Harvey *v.* McAdams, 32 Mich. 472.

So, where one partner has an attach-

Having made these preliminary observations, it is proposed, in the present section, to examine the liability of partners for torts and frauds, as distinguished from contracts.

First, as regards torts.

Torts of partners.—It follows from the principle of agency, coupled with the doctrine that each partner is the agent of the firm for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership. It has accordingly been held that a firm of coach proprietors is answerable for the negligent driving of a partnership coach by one of the firm, the coach being driven for the firm in the ordinary course of business;(*l*) and that two partners are liable for not keeping the shaft of a mine in proper order, although one of them only actually superintended it.(*m*) So, a partnership is liable for the negligence of its servants acting in the course of their employment by the firm.(*n*)[34]

ment made on account of a firm debt, and the goods are afterwards sold under an execution in the same suit, and the proceeds applied to meet the debt, this is proof of a ratification of the attachment by all the partners; and if it be wrongful, they will all be liable in an action of tort. Gurler *v.* Wood, 16 N. H. 539.

But where one partner in a firm acting as agents for the owner of demised property, commits a trespass in expelling the tenant and removing his goods, the other partner, who takes no part in the act and knows nothing of it at the time, and neither advises nor directs it, cannot be rendered liable on the mere ground of his subsequent approval and sanctioning of the act after its commission. Grund *v.* Van Vleck, 69 Ill. 478.

(*l*) Moreton *v.* Hardern, 4 Barn. & C. 223; and see, as to ships, Steel *v.* Lester, 3 C. P. D. 121.

(*m*) Mellors *v.* Shaw, 1 Best & S. 437; Ashworth *v.* Stanwix, 7 Jur. (N. S.) 467, and 3 El. & E. 701. See, as to irregular executions of writs by one of two partners, Duke of Brunswick *v.* Slowman, 8 C. B. 317.

(*n*) Stables *v.* Eley, 1 Car. & P. 614.

34. **Torts of partners, generally.**—The firm is liable *in solido* for the tort of one partner committed by him as such, and in the course of the firm business (Stockwell *v.* United States, 3 Cliff. (U. S.) 284); but if a partner commit a tort, not as a partner, but as an individual, in respect to a matter entirely foreign to the business of the partnership, the other partners are not liable (Schwabacker *v.* Riddle, 84 Ill. 517) unless they either authorized or adopted the wrongful act. Graham *v.* Meger, 4 Blatchf. (U. S.) 129; Heirn *v.* McCaughan, 32 Miss. 17; Taylor *v.* Jones, 42 N. H. 25. See, also, Roney *v.* Buckland, 5 Nev. 219.

Conversion.—Where one partner, in the due course of business of the firm, seizes and takes the property of another, which is appropriated to the use and benefit of the firm, thereby increasing its

Breach of revenue laws.—If one partner, in conducting the business of the firm, is guilty of a breach of the revenue laws, all the partners are jointly and severally answerable for the consequent penalties, although they may not themselves have authorized or been parties to the illegal conduct of their copartner. (*o*)[35]

assets, the other partners will be liable for the conversion. Durant *v.* Rogers, 87 Ill. 508.

An assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and they were in a situation to have originally commanded the conversion. Loomis *v.* Barker, 69 Ill. 360. S. P., In re Ketchum, 1 Fed. Rep. 815.

A conversion by one of a firm to which goods have been sent to be made up, does not excuse the owner from paying the other partners, and therefore he may bring trover against the guilty partner alone. Stevens *v.* Faucet, 24 Ill. 483.

In Loomis *v.* Barker (69 Ill. 360), where one partner placed a claim in the hands of a constable for collection, under which property of a stranger was seized and sold under attachment or execution, and the other partner being present at the sale, bid on the property, and treated and spoke of it as having been taken and sold on the process issued upon a claim due the firm, and received the proceeds of the sale as a payment on such claim, it was held in trover by the owner against the partners, that they were both liable for the conversion. Loomis *v.* Barker, 69 Ill. 360. See, also, Chambus *v.* Clearwater, 1 Abb. (N. Y.) App. Dec. 341; S. C., 1 Keyes 310; affirming 41 Barb. 200.

Negligence.—The owner of a horse borrowed by a partner to be used in the firm business, and lost through his neglect, or other wrong doing, may recover therefor against the partnership. Witcher *v.* Brewer, 49 Ala. 119. And an action for injuries sustained through the negligence of an employee of a firm may be brought against any one or more, or all, of its members. Roberts *v.* Johnson, 58 N. Y. 613.

(*o*) R. *v.* Stranyforth, Bunb. 97; Attorney-General *v.* Burges, Id. 223; Attorney-General *v.* Weeks, Ib.; R. *v.* Manning, Comyn 616. See, also, Mullins *v.* Collins, L. R., 9 Q. B. 292; Attorney-General *v.* Siddon, 1 Cromp. & J. 220. Compare Newman *v.* Jones, 17 Q. B. D. 132.

35. Breach of revenue laws.—Every partner is civilly liable for violations of the revenue law by his copartners, whether he knew of or consented to such violations or not. United States *v.* Thomasson, 4 Biss. (U. S.) 99. And two or more partners are jointly and severally criminally liable for the circulation of change-bills by their clerk, in violation of Ala. Rev. Code, § 3643, although they did not jointly assent thereto, and did not know when the bills were emitted. Barnett *v.* State, 54 Ala. 579.

If two persons composing a firm make and sign, in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. United States *v.* McGinnis, 1 Abb. (U. S) 120. And where one of two partners, with the other's knowledge, converted to the firm's use money received by him as United States revenue collector, it was held that a bond given by the firm to indemnify the sureties on the collector's bond created a firm indebtedness, even though, at the time it was given, the sureties had not made good the defalcation, as

Willful torts.—As a rule, however, the willful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm *is not answerable, unless all the members are, in fact, privy to the malicious prosecution.(*p*) But a willful tort, committed by a partner in the course and for the purpose of transacting the business of the firm, may make the firm responsible.(*q*)[36]

*150]

Secondly, as regards frauds.

Frauds of partners.—An ordinary firm is liable for frauds committed by one of its members whilst acting for the firm and in transacting its business, and the innocent partners cannot divest themselves of responsibility on the ground that they never authorized the commission of the fraud. On the other hand, the firm is not liable for the other frauds of its members, unless it has in fact sanctioned such frauds, or the transactions of which they form part. It will be convenient to examine this subject, first, with reference to misapplications of money, and secondly, with reference to false representations by partners.[37]

their liability became fixed immediately upon the conversion. Wharton *v.* Clements, 3 Del. Ch. 209.

(*p*) Arbuckle *v.* Taylor, 3 Dow 160.

(*q*) See Limpus *v.* Lon. Gen. Om. Co., 1 Hurlst. & C. 526; Pollock on Torts 80, *et seq.*

36. Willful torts.—That all of the partners owning a newspaper are liable for a libel published therein by one of them, see Lothrop *v.* Adams, 133 Mass. 471.

37. Frauds of partners, generally.—All the members of a firm are answerable for a fraud committed by one of them, or by their agent, acting within the scope of his authority. Locke *v.* Stearns, 1 Metc. (Mass.) 560; Reynolds *v.* Waller, 1 Wash. (U. S.) 164; Durant *v.* Rogers, 87 Ill. 508; Wolf *v.* Mills, 56 Ill. 360; Chester *v.* Dickerson, 54 N. Y. 1; Manufacturers', &c., Bank *v.* Gore, 15 Mass. 75, 81; Boardman *v.* Gore, Id. 331; Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421; Doremus *v.* McCormick, 7 Gill (Md.) 49; Tenney *v.* Foote, 95 Ill. 101. As to what facts will raise a presumption that a partner was cognizant of and assenting to a fraud committed by his copartners, see Townsend *v.* Bogart, 11 Abb. (N. Y.) Pr. 355.

Where A, on entering into partnership with B, purchases an interest in a stock of goods held by B, and the goods are afterwards seized on attachment as the property of a third person, and in an action by A and B against the attaching officer it appears that the goods were sold to B by the attachment debtor, and that such sale was fraudulent and void as to the attaching creditor, A and B cannot recover any part of the goods, on the ground that A purchased his interest without knowledge of the fraud. Estabrook *v.* Messersmith, 18 Wis. 545.

A and B formed a partnership in the

Liability of partnerships for misapplication of money by their members.—In order that a firm may be liable for the misapplication of money by one of its members, some obligation on the part of the firm to take care of the money must be shown. A receipt of the money by the firm *prima facie* imposes this obligation; but where there is no receipt by the firm, there is *prima facie* no obligation on its part with respect to the money in question. It becomes important, therefore, to determine accurately when money is to be considered as received by the firm. Upon this point, the following observations suggest themselves:

1. The firm must be treated as receiving what any partner receives as its real or ostensible agent, *i. e.*, in the course of transacting the business of the firm.

2. In a case of this sort, it is immaterial whether the other partners know anything about the money or not, for *ex hypothesi*, it is in the custody of one who must be regarded as their agent. (*r*)

3. The firm cannot be treated as receiving what one partner receives otherwise than as its real or ostensible agent, unless *the money actually comes into the possession or under the control of the other partners. (*s*) [*151

4. Agency being excluded in such a case as the last, the money cannot be considered as in the possession or under the control of the innocent partners, unless they know that it is so, or unless they are culpably ignorant of the fact. (*t*)

These principles will be found to reconcile most, if not all, of the numerous decisions upon the important subject now under consideration, and to warrant the following rules deduced from them.

1. *Liability of firm for money received by one partner in the course of business.*—Where one partner, acting within the scope of his au-

commission business, A furnished the capital, and B generally did all the trading. B made a contract with another in the course of the firm business, which was illegal, as relating to option or gaming contracts. *Held*, that a note given in consideration of a balance due under such contract to the firm, was void as against the firm, or an assignee with notice, although A, the other partner, had no knowledge of the illegality of the contract. Tenney *v.* Foote, 95 Ill. 101.

(*r*) See *infra*, rules 1, 2, 3.

(*s*) See rules 3 and 4.

(*t*) Compare rule 2 with rules 3, 4 and 5, and see *infra*, p. *161; and as to culpable ignorance, compare Marsh *v.* Keating, 2 Cl. & F. 289; Sims *v.* Brutton, 5 Ex. 802; Ex parte Geaves, 8 De G., M. & G. 291; Cleather *v.* Twisden, 28 Ch. D. 340.

thority, as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it. [38]

In Willett *v.* Chambers (*u*) two persons carried on business as solicitors and conveyancers, in partnership. One of them received money from a client to invest on mortgage, and misapplied it. The other partner was held liable to repay it to the client. Lord Mansfield relied upon the fact that the bill for the fictitious mortgage was made out in the name of the firm and was paid to the innocent partner. The transaction, therefore, was clearly a partnership transaction, and the defendant, although perfectly innocent of the fraud himself, was liable for the consequences.

In Brydges *v.* Branfill (*x*) one of several solicitors connived at a fraud committed by a client of the firm in obtaining money *out
*152] of the Court of Chancery. The money was received by the one partner under a power of attorney and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was nevertheless held that they were

38. Misapplication of money received by one partner in the course of business.—Money was fraudulently obtained by one partner, in the name of the firm, and in business transactions such as the firm engaged in. *Held*, that the firm might be liable therefor, although the transactions were unknown to the other partner; but that if the person dealing with the one partner knew that he was acting in violation of his duty to the firm, the latter would not be liable. Alexander *v.* State, 56 Ga. 478.

Where a claim was placed in the hands of two attorneys, who were partners in the practice of law, for collection, a judgment obtained, land of the debtor sold under execution, and redemption from the sale by paying the money to the sheriff, who paid it over to one of the attorneys, and prior to the redemption the law copartnership between the attorneys was dissolved, both of the partners were held liable to the client for the money thus received by one of them after the dissolution. Smyth *v.* Harvie, 31 Ill. 62. S. P., Poole *v.* Gist, 4 McCord (S. C.) 259.

(*u*) Cowp. 814. See, also, Atkinson *v.* Mackreth, 2 Eq. 570; St. Aubyn *v.* Smart, 5 Eq. 183, and 3 Ch. 646; Dundonald *v.* Masterman, 7 Eq. 515. Compare Cleather *v.* Twisden, 28 Ch. D. 340; Viney *v.* Chaplin, 2 De G. & J. 483, and Bourdillon *v.* Roche, 27 L. J. Ch. 681, and Harman *v.* Johnson, 2 El. & B. 61; Plumer *v.* Gregory, 18 Ex. 621, noticed *infra*. These cases show that whilst it is the ordinary business of a solicitor to receive money from a client for investment on a specific security, it is not part of his ordinary business to receive money for investment generally, nor to keep negotiable securities for his clients, nor, without express authority from them, to receive money for them on the payment off of a mortgage, or on a sale. See, also, Re Bellamy and Met. Bd. of Works, 24 Ch. D. 387.

(*x*) 12 Sim. 369. See, too, Todd *v.* Studholme, 3 Kay & J. 324.

jointly and severally liable to make good the money to those to whom it really belonged. (*y*)

In these cases the receipt of the money by one of the partners was the receipt by the firm, and the firm was liable, although, in fact, the other partners never received the money or knew of its receipt. (*z*)

2. *Liability of firm for money in its custody in the course of business.* —Where a firm in the course of its business (*a*) receives money belonging to other people and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.[39]

In Devaynes *v.* Noble, Clayton's case, (*b*) some exchequer bills, deposited by their owner with a firm of bankers, were sold by one of the partners without the owner's knowledge; the money produced by the sale was applied by the firm to its own use, and it was held to be clear that the money having been received by the partnership, the amount became a partnership debt whether all the individual partners were or were not privy to the sale.

In Devaynes *v.* Noble, Baring's case, (*c*) the firm was held liable for stock of its customers standing in the name of one of the partners of the firm and wrongfully sold out by him. For the stock was stand-

(*y*) Although solicitors who are partners are responsible for the acts of each other, the court will not exercise its summary jurisdiction against a solicitor to whom personally no blame is attributable. See, Re Lawrence, 2 Sm. & G. 367; Ex parte Gould, 2 Mont. & A. 48; Dixon *v.* Wilkinson, 4 Drew. 614, and 4 De G. & J. 508; and Re Ford, 8 Dowl. 684. But where a firm of solicitors are the solicitors on the record, see Norton *v.* Cooper, 3 Sm. & G. 375.

(*z*) See St. Aubyn *v.* Smart, *ubi sup.*

(*a*) See *infra*, propositions 3 and 5, as to the importance of this qualification.

39. **Money in firm's custody in course of business.**—A partner, innocent in fact, may be charged for a conversion by his copartners, in the regular line of firm business, the profits and commissions thereon having gone to the firm account. Castle *v.* Bullard, 23 How. (U. S.) 172.

Thus, the tortious conversion of succession property by a commercial firm will render the members liable *in solido*. Birdsall *v.* Bemiss, 2 La. Ann. 449.

In Gordon *v.* Coolidge (1 Sumn. (U. S.) 537) an assignment was made by a debtor for the benefit of his creditors to a firm of two attorneys as trustees, one of whom assented to the assignment at the time, in the absence of the other. *Held*, that the assent of the latter must be presumed, unless, upon notice, he refused to accept the trust, and gave notice of his refusal to the debtor; especially where he and his partner proceeded to act under the assignment, by a private conditional agreement between them, as to giving a priority to certain attachments made by them in favor of certain creditors, which agreements were unknown to the debtor.

(*b*) 1 Mer. 575.

(*c*) 1 Mer. 611; see, too, Warde's Case, Id. 624, and Vulliamy *v.* Noble, 3 Mer. 593.

ing in his name alone, in accordance with the ordinary practice of the firm; the produce of the sale of the stock had been received by the firm, and had thus become a partnership debt, and the firm, in the accounts rendered by *it to its customer, had falsely represented the stock as still standing in the name of the partner [*153 who had sold it and had given credit for the dividends as if the stock had still been there.

In Ex parte Biddulph(*d*) trust money in the hands of a firm of bankers was drawn out and misapplied by one of the firm, and it was held that all the partners were liable to make it good.

In Sadler *v.* Lee(*e*) the members of a banking firm were authorized jointly and severally to sell out stock standing in the name of a customer, and one of the partners exercised the power and sold out the stock, and the firm was credited with the proceeds of the sale. These were afterwards misapplied by one of the partners, and it was held that the firm was answerable for the money.

Another well-known case illustrating the same principle is Blair *v.* Bromley.(*f*) There two persons were in partnership as solicitors. A client entrusted one of them with money to invest on mortgage, and was told by him that it had been invested, whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became bankrupt. The other partner, who knew nothing whatever of the fraud, was nevertheless held liable to make good the money. It had been placed to the partnership account at the bankers of the firm. The representation that it had been duly invested was within the scope of the duty of one partner with reference to the transaction in question, and it was held that the innocent partner could not divest himself of his liability by showing that he had no control over the account at the bankers, and did not in fact attend to the monetary transactions of the firm.

*154] In De Ribeyre *v.* Barclay(*g*) the defendants were in part- *nership as stockholders, and were in the habit of receiving moneys from the friends and connections of the firm, and of the in-

(*d*) 3 De G. & S. 587.
(*e*) 6 Beav. 324.
(*f*) 5 Hare 542, and 2 Ph. 354. See, also, Eager *v.* Barnes, 31 Beav. 579, a somewhat similar case.
(*g*) 23 Beav. 107; compare this case

dividual partners for the purposes of investment. They also seem to have been in the habit of keeping for their customers the securities on which the investments were made. The plaintiff had some Portuguese bonds held by one of the partners for the plaintiff as a customer of the firm. The plaintiff married, and these bonds were assigned to trustees, of whom that partner was one. The bonds remained in his custody as before, and were in fact deposited (and, as it seemed, with other securities belonging to other customers) with the bankers of the firm. The bonds were afterwards converted by the same partner into other bonds, which were deposited as the first had been. He acted in this matter as a stockbroker, in conformity with the usual course of business of the firm, and advised the plaintiff from time to time in the name of the firm of what had been done. The bonds were afterwards misapplied by him. It was held that they were originally clearly in the custody of the firm, and not in the custody of one only of its members, simply as trustee. It was further held that the assignment of the bonds did not take them out of the custody of the firm, and that the firm was therefore liable for the loss consequent on their unauthorized removal.

In the same case the firm was held liable for the loss of other bonds and securities bought by them for the plaintiff, and left in their custody in the usual way, and for money borrowed in the name of the firm, but from which the firm derived no benefit; and the fact that the plaintiff dealt only with one partner was held immaterial, the business transacted being the ordinary and regular business of the firm, and appearing as such in its books and accounts.

Principle of foregoing cases.—The principle of these cases is that the firm has, in the ordinary course of its business, obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances, the firm is responsible, and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners does not lessen the liability of the firm, for whether the firm is or is not liable for the original fraud by which the property *got into its hands, it is responsible for the subsequent misapplication thereof by one of its members. [*155

with Ex parte Eyre, 1 Ph. 227; Bishop *v.* Coomer *v.* Bromley, 5 De G. & S. 532, no- The Countess of Jersey, 2 Drew. 143; ticed *infra*, p. *159.

This was decided in the cases arising out of the notorious Fauntleroy forgeries. (*h*) Fauntleroy, who was a partner in the banking house of Marsh & Co., forged powers of attorney for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co. with Martin Stone & Co. Fauntleroy then drew out these moneys by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place. The liability of the firm was based upon the ground that to sell stock for its customers and to receive the proceeds of the sale, fell within the scope of its business; that the sale took place and the money was received in the usual way; that the fraud of Fauntleroy in the subsequent appropriation of the money afforded no defence after the money had once been in the custody of the firm, and that if the other partners knew nothing of the receipt of the money, they might have known it, and would have have ascertained the source from which it had been derived, if they had used ordinary diligence and had not placed such implicit confidence in their copartner. (*i*)

3. *Liability of firm for money received, but not in ordinary course of business.*—If a partner, in the course of some transaction unconnected with the business of the firm, or not within the scope of such

*156] *business, obtains money and then misapplies it, the firm is not, without more, (*j*) liable to make good the loss. (*k*) [40]

(*h*) Stone *v.* Marsh, 6 Barn. & C. 551, and Ry. & M. 364; Keating *v.* Marsh, 1 Mont. & A. 582; Marsh *v.* Keating, 1 Bing. N. C. 198, and 2 Cl. & F. 250; Ex parte Bolland, Mont. & M. 315, and 1 Mont. & A. 570; Hume *v.* Bolland, Ry. & M. 371, and 1 Cromp. & M. 130. This last case is hardly consistent with Stone *v.* Marsh, Marsh *v.* Keating, or Ex parte Bolland.

(*i*) In Stone *v.* Marsh and Ex parte Bolland, Fauntleroy's partners did know that the stock was sold by their broker, but did not know that the powers of attorney were forged. In Marsh *v.* Keating, they do not seem to have known anything either of the sale of the stock or of the receipt of the proceeds of the sale. Compare, as to the receipt of the money by the firm, the cases cited in the next four pages.

(*j*) As to the effect of knowledge on the part of the other partners, see Cleather *v.* Twisden, 28 Ch. D. 340, noticed *infra*, and proposition 5, *infra*.

(*k*) See, also, proposition 4, *infra*.

40. **Money obtained by one partner, but not in the course of the firm busi-**

In Harman *v.* Johnson (*l*) one of several solicitors was entrusted with money for the purpose of investing it on mortgage when a good opportunity offered. He misapplied it, and it was held that his copartner was not liable, inasmuch as there was no evidence to show that it was part of the business, either of the firm in question or of solicitors generally, to act as scriveners, *i. e.*, as depositaries of money waiting for investment. The court intimated that if it had been shown that the money was given to the defaulting solicitor for the purpose of being invested on some specified mortgage, his copartner would have been liable for its misapplication.

In Plumer *v.* Gregory (*m*) one of a firm of solicitors borrowed money, without the knowledge of his copartners, from a client, saying that the firm wanted to lend it to another client on mortgage. The other partners were held not liable for this money, although two of them had borrowed money from the same client before.

In Cleather *v.* Twisden (*n*) bonds payable to bearer were placed for safe custody by trustees in the hands of one of a firm of solicitors, and he misappropriated them. The other partners were held not liable, it being no part of their business to accept such securities for safe custody, and they not, in fact, knowing that their partner had them. The decision would have been the other way if it had been proved that the innocent partners had in fact known that the bonds

ness.—Where an administrator, who is a member of a partnership, applies to the partnership concerns money which belongs to the estate of his intestate, and afterwards gives the note of the firm to the creditor of the intestate, to whom such money was due, in discharge of such creditor's claim on the estate of the intestate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. Richardson *v.* French, 4 Metc. (Mass.) 577.

Where an agent collected money of his principal and mingled it with the money of a firm in which he was a partner, and the money was used by the firm, it was held that this created a partnership liability, although the other partner was ignorant of the conversion. Palmer *v.* Scott, 68 Ala. 380.

Where a firm bought and paid for certain property, and the vendor deposited the money with one of the members of the firm, to be held until the purchasers should be satisfied with the title—*Held*, that in the absence of any knowledge of or connection with such deposit on the part of the other members of the firm no responsibility attached to them in consequence thereof. Battle *v.* Street (Tenn.), 2 S. W. Rep. 384.

(*l*) 2 El. & B. 61.

(*m*) Plumer *v.* Gregory, 18 Eq. 621, as to the £1700. Compare this and the last case with Willett *v.* Chambers, and other cases cited *ante* p. *151, note (*u*).

(*n*) 28 Ch. D. 340.

were in the custody of their copartner as representing the firm. Had such knowledge been proved, they would have been held to have had the bonds in their own custody, and would have been liable for them. (*o*)

The case of Sims *v.* Brutton (*p*) must be referred to this head *if its authority is to be upheld. There the defendants, Brutton and Clipperton, were in partnership as solicitors. Brutton received £500 from a client to invest on a mortgage, and the money was duly invested. The mortgage deed remained with the defendants, and the money secured by it was ultimately repaid to Clipperton, who then gave up the deed to the mortgagor. Shortly after this, Clipperton re-lent £300, part of the £500, and again received back the mortgage deed as a security, and ultimately this £300 was repaid to him and the mortgage deed was again delivered up to the mortgagor. Clipperton had no authority to receive payment of the £500 from the mortgagor, nor to relend the £300, nor to receive repayment of it, and he acted throughout the whole of these transactions without the knowledge of his copartner or of the mortgagee, the client of the firm. The books of the firm, however, showed the receipt of the £500 in the first instance, its loan and repayment, and also the loan and repayment of the £300. The client was, moreover, credited from first to last with the receipt of interest on the whole £500, and was debited with the same interest, which was, in fact, regularly paid to his agent. Clipperton misapplied the whole £500, and the court held that Brutton, his partner, was not liable to make it good. The defendants, it was said, discharged their duty by laying out the money as directed, and they had no authority to receive it back. Therefore, the repayment to Clipperton, though treated by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility. The entries in the books were only evidence of knowledge on the part of Brutton, and the case stated for the opinion of the court expressly found that he had no knowledge of the facts. [*157

Upon this case it is to be observed that if, as appears to have been the case, the £500, when paid off, was placed to the credit of the firm with its bankers, the decision is difficult to reconcile with Stone *v.* Marsh and Marsh *v.* Keating. (*q*)

(*o*) See *infra*, proposition 5, p. *160.

(*p*) 5 Ex. 802. See, also, Coomer *v.* Bromley, 5 De G. & S. 532, noticed *infra*, p. *159.

(*q*) The statute of limitations afforded

4. *Liability of firm for frauds of partner acting on his own account.*—A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not *been connected with the firm he might not have been in a position to commit the fraud. 41

*158]

This is little more than another mode of stating proposition 3, and the cases just alluded to may also be referred to under this head. In addition to them, the following deserve notice:

In Ex parte Eyre (*r*) the customer of a firm of bankers deposited with them a box containing securities belonging to himself, and he authorized one of the firm to take out some of the securities, replacing others, however, in their place. The partner so authorized, after obtaining the securities he was authorized to take, and substituting others, clandestinely withdrew these last and applied them to his own use. It was held that the firm was not liable for this act, and was not bound to make good the consequent loss, for it did not appear that the firm had any authority to open the box or to examine its contents, and the abstraction of the securities was a tortious act committed by one partner, who had been specially authorized to open the box and who took out the securities, not for the partnership nor for any partnership object, but in his separate character and for his own individual and separate purposes.

In Bishop *v.* The Countess of Jersey (*s*) one of a firm of bankers advised the plaintiff, a customer of the bank, to sell out some stock, telling her that there was an opportunity to place out £5000 on a good security at five per cent., to be given by his son. She accordingly authorized the sale, and the money produced was placed to her credit at the bank. She then drew a cheque for £5000, which she gave to the partner with whom she had been in communication. No security was ever given, the money was lost, the partner in question absconded.

a good defence to the action in Sims *v.* Brutton. The propriety of the decision in that respect is untouched by the observations in the text.

41. Frauds of partner acting on his own account.—The rule stated in the text is supported by a number of American decisions, among which see Pierce *v.* Jackson, 6 Mass. 242; Sherwood *v.* Marwick, 5 Me. 295. But compare Manufacturers', &c., Bank *v.* Gore, 15 Mass. 75, 81; Boardman *v.* Gore, Id. 331; Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421; Reynolds *v.* Waller, 1 Wash. (Va.) 164.

(*r*) 1 Ph. 227, affirming S. C., 2 Mont., D. & D. 66.

(*s*) 2 Drew. 143.

Interest, however, on the £5000 was for some time placed to the credit of the plaintiff in her account with the bank, but by whom did not appear. The other partners knew nothing of what had taken place until after the fraud had been committed, and it was held that they were not answerable. The transactions had nothing to do with the business of the partnership, and if they had not taken place at the bank there would have been no pretence for saying that the one *partner was acting otherwise than in a separate affair of his own. [*159

A more difficult case, but one turning mainly on the same principle, is to be met with in Coomer *v.* Bromley. (*t*) There, the defendants, William and Joseph Bromley, were solicitors. The plaintiffs were their clients, and were trustees of some navy five per cent. annuities, in which they were themselves beneficially interested for their lives. William Bromley was associated by the plaintiffs with them as trustee of these annuities. Upon their reduction from five to four per cent., the annuities were sold at the request of the plaintiffs, and it was arranged that the money arising from the sale should be invested on mortgage to be taken, with the plaintiffs' consent, in William Bromley's name alone. The annuities were sold; the money arising from the sale found its way to the credit of the firm at its banker's, but was not invested on mortgage as intended, and was apparently used as partnership money. William Bromley pretended that he had invested the money, and he paid interest accordingly. Ultimately, and with the plaintiffs' knowledge, a mortgage, of which William Bromley was sole mortgagee, was appropriated as a security for the money in question. This mortgage was sufficient in point of value to cover the amount realized by the sale, and was for that amount less a few pounds, which the plaintiffs divided between them. The security thus appropriated was afterwards realized by William Bromley, and he misapplied the money, but it was not placed to the credit of the firm, nor did Joseph Bromley know anything of its receipt or application. Under these circumstances it was held that Joseph was not liable to the plaintiffs for the loss, for the plaintiffs dealt with William Bromley as a trustee, and not as a partner; they authorized him to take a mortgage in his own name alone; they acquiesced in the appropriation to their money

(*t*) 5 De G. & S. 532. See, too, Sims *v.* Compare St. Aubyn *v.* Smart, 5 Eq. 183, Brutton, 5 Ex. 802, noticed *ante* p. *156. and 3 Ch. 646.

of a security which was of sufficient value, and Joseph's duty was then at an end. The plaintiffs could not hold him liable for the loss of the mortgage money arising subsequently from the fraud of the mortgagee.

*160] *In these cases it will be observed that although the money in question had at one time been in the custody of the firm, such was not the case when the money was misapplied. This circumstance distinguishes the cases last referred to from DeRibeyre *v.* Barclay (*u*) and other cases of that class, the leading facts in which have been already stated. (*v*)

5. *Liability of firm for trust moneys.*—If a partner, being a trustee, improperly employs the money of his *cestui que trust* in the partnership business or in payment of the partnership debts, this alone is not sufficient to entitle the *cestui que trust* to obtain repayment of his money from the firm. 42

In Ex parte Apsey (*x*) one of two assignees in bankruptcy was in

(*u*) 23 Beav. 107.

(*v*) *Ante* p. *153.

42. Liability of firm for trust moneys. —The general rule undoubtedly is that where one partner holds money in trust for another, or borrows money on his individual credit, and applies it to the use of the firm, this does not make the original creditor a creditor of the firm, unless it is applied with the knowledge and privity of his copartners. Jaques *v.* Marquand, 6 Cow. (N. Y.) 497; Logan *v.* Bond, 13 Ga. 192; Tallmadge *v.* Penoyer, 35 Barb. (N. Y.) 120; Willett *v.* Stringer, 17 Abb. (N. Y.) Pr. 153; Guillon *v.* Peterson, 9 Phil. (Pa.) 225. But where such money is used for firm purposes, with the consent of all the partners, but without the consent of the owner of the money, such owner may elect to consider the firm his debtor, instead of the separate partner. Hutchinson *v.* Smith, 7 Paige (N. Y.) 26. S. P., In re Jordan, 2 Fed. Rep. 319. Thus, if one partner in a real estate firm receives money from a customer with which to purchase land, and passes it over to his partner, who deposits it to the credit of the firm, and the proof fails to show that it was invested as agreed, the firm will be liable. Kerr *v.* Sharp, 83 Ill. 199.

After a dividend is declared by a partnership, and the partner holding the share of an absent member, under a resolution of the company, pays it over in extinguishment of a debt due the company by another partner who promised to settle with the absent partner, all the members present, not dissenting from the resolution, are jointly liable for the amount of the dividend. Peters *v.* Horbach, 4 Pa. St. 134. S. P., Wentworth *v.* Raiguel, 9 Phil. (Pa.) 275.

In one case, however, where one member of a firm applied to its business money which he held as agent of a third party, it was held that the firm was liable, whether the other partners knew at the time that the money belonged to such party or not. Welker *v.* Wallace, 31 Ga. 362.

(*x*) 3 Bro. C. C. 265. See, also, Ex parte White, 6 Ch. 397.

partnership, and he applied part of the assets of the bankrupt in paying partnership debts. On the subsequent bankruptcy of the partnership it was held that the amount so applied was not provable against the joint estate.

In Ex parte Heaton (*y*) a father and his sons were partners; the sons were trustees of a will, and instead of applying the trust moneys according to the trust, they appropriated them to partnership purposes; but on the bankruptcy of the partnership it was held that the amount of the moneys so appropriated was not provable against the joint estate unless it could be shown that they were employed for the use of the partnership trade with the knowledge of the father that they were trust funds, and an inquiry as to that was directed. (*z*)

It may at first sight be thought that these cases are opposed to Marsh *v.* Keating and the other authorities before referred to, (*a*) in which the firm was held liable for money which came to its hands. But in those cases the money came to the hands of the firm in the ordinary course of its business; (*b*) whilst in *the cases now under consideration it is supposed to come otherwise. [*161 Liability must therefore attach to the firm, if at all, on wholly different principles, and the fact that the firm has had the benefit of the trust moneys is not sufficient to render it responsible for them. To be liable, the firm must be implicated in the breach of trust, and this it cannot be unless all the partners either knew whence the money came or knew that it did not belong to the partner making use of it. Knowledge on the part of one partner will not affect the others, for the fact to be known has nothing to do with the business of the firm, and the case of Ex parte Heaton, already referred to, shows that in cases of this kind the liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned.

Where firm knows of the breach of trust.—But if knowledge of

(*y*) Buck 386.

(*z*) Ex parte Clowes, 2 Bro. C. C. 595, is not opposed to the cases in the text, for there the joint and separate estates were consolidated.

(*a*) *Ante* pp. *152–*155.

(*b*) This may be thought incorrect with respect to Marsh *v.* Keating; but it was the business of the firm there to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds; and the money for which the firm was held answerable did arise from the sale of the stock of a customer, though it was sold under a forged power of attorney; and although Fauntleroy's partners knew nothing of the receipt of the money, their ignorance was considered culpable and of no avail.

these matters can be imputed to the other partners, if they know, or ought to be treated as knowing, that trust moneys are being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorizes the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss. (*c*) It is important to bear this in mind when one partner has died; for if the surviving partners deal with his property, knowing that it belongs to his estate, knowledge of the trust on which the property is held will be imputed to them, and they may be thus involved in all the consequences of a breach of trust. (*d*) But this doctrine can hardly extend to the case of incoming partners who do nothing except leave matters as they find them when they enter the firm. (*e*) [43]

Liability for breach of trust joint and several.—If partners are im-

(*c*) See Ex parte Woodin, 3 Mont., D. & D. 399; Ex parte Poulson, De G. 79; Ex parte Watson, 2 Ves. & B. 414; Smith *v.* Jameson, 5 T. R. 601; Keble *v.* Thompson, 3 Bro. C. C. 112, and compare Ex parte Geaves, 8 De G., M. & G. 291; Ex parte Barnewall, 6 De G., M. & G. 801; Ex parte Burton, 3 Mont., D. & D. 364.

(*d*) See *infra*, book IV., ch. 3, § 3.

(*e*) See Twyford *v.* Trail, 7 Sim. 92.

43. **The firm must know of the breach of trust.**—If funds of a married woman, held in trust under the code, by her husband, are mingled by him with the funds of a partnership of which he is a member, the partnership funds are not charged with the trust, either during the life of the husband or after his death. Dent *v.* Slough, 40 Ala. 518.

A and B were jointly interested in a claim which was ultimately decided in their favor. Before the decision was made, A formed a partnership with C, and the money was remitted to the firm of A & C, and placed to A's credit on the books of the firm. A died insolvent, largely indebted to C. It appeared that C, previously to forming the partnership with A, had full knowledge of the interest of B in the claim. *Held*, that C could not apply the money to the satisfaction of his debt against A, and that B was entitled to recover his proportion of all the money received on account of the claim. Vanderwick *v.* Summerl, 2 Wash. (U. S.) 41.

One partner took money from the partnership funds, which he put into a new partnership. *Held*, that upon the insolvency of the new partnership, the former partnership could not follow the funds so taken, so as to give it a priority over other creditors. Ramsay *v.* Deas, 2 Desaus. (S. C.) 239.

The rule allowing trust property to be followed into whatsoever hands it goes, with notice of the trust, has been held not to apply where an officer of a bank, who was also a member of a partnership, without due security lent to his firm funds of the bank, which became mingled with the other partnership property. Case *v.* Beauregard, 1 Woods (U. S.) 125.

Where trust property is contributed to the capital stock of a copartnership at the time of its formation, by a trustee, as his own property, without notice or knowledge to the other copartners of the fact of its being trust property, the case is closely analogous to its sale and purchase, with little, if any, difference in principle. In such case, the *cestui que trust* seeking his property (thus converted) from the partnership assets, can only claim and take

plicated in a breach of trust, their liability is joint and several, (*f*) and a decree for costs will be made *against them all, although they may not be all equally to blame. (*g*)

*162]

Borrowing trust money.—But persons who borrow trust money from executors or trustees are only liable to repay it with interest; and although the lenders may have no authority to lend the money, the borrowers are not liable to account for the profits which they may have realized by its employment. (*h*)

Following trust money.—Although a firm is not liable to make good trust money applied to its use by one of its members in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust, this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm, and demanding it back, if he can show that the firm still has it, and the firm did not come by it by purchase for value without notice. The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. His right is incidental to his ownership, and whether the money is traced to the hands of a single individual or to the hands of a firm is wholly immaterial. (*i*) [44]

therefrom what his trustee would be entitled to take had he been vested with absolute ownership of the funds invested by him in the copartnership, instead of holding the same, as he did, merely in trust. The equities of the copartners of a trustee who deal with him as the absolute owner of the property contributed by him to the copartnership, and without notice or knowledge of any trust relations in regard to the same, are paramount to those of the *cestui que trust* in regard to such property. Hollemback *v.* Moore, 44 N. Y. Super. Ct. 107.

(*f*) Re Oxford Benefit Building Soc., 35 Ch. D. 502; Imperial Mercantile Credit Assoc. *v.* Coleman, L. R., 6 H. L. 189; Devaynes *v.* Noble, Sleech's case, 1 Mer. 563; Baring's Case, Id. 614; Sadler *v.* Lee, 6 Beav. 324; Brydges *v.* Branfill, 12 Sim. 369; Blair *v.* Bromley, 2 Ph. 359; Wilson *v.* Moore, 1 Myl. & K. 127, 337; Ex parte Poulson, De G. 79. Compare Ex parte Burton, 3 Mont., D. & D. 364. It, however, by no means follows that on the bankruptcy of the firm there can be a proof against the joint as well as against the separate estate. See Ex parte Barnewall, 6 De G., M. & G. 801. This will be discussed in the chapter on Bankruptcy.

(*g*) Lawrence *v.* Bowle, 2 Ph. 140.

(*h*) Vyse *v.* Foster, L. R., 7 H. L. 318; Stroud *v.* Gwyer, 28 Beav. 130.

(*i*) See, as to tracing money, Lewin on Trusts (8th ed.), ch. 30, § 2; Re Hallett's Estate, 13 Ch. D. 696; Re West of England Bank, 11 Ch. D. 773; Brown *v.* Adams, 4 Ch. 764; Pennell *v.* Deffell, 4 De G., M. & G. 372; Frith *v.* Cartland, 2 Hem. & M. 417; Scott *v.* Surman, Willes 400; Taylor *v.* Plumer, 3 Mau. & S. 562; Small *v.* Attwood, You. 507; Pannell *v.* Hurley, 2 Coll. 241.

44. See Hollemback *v.* Moore, cited at close of note 43, *supra*.

Liability of partnerships for the false representations of their members.—In considering the liability of a firm for the false representations of one of its members, it is necessary to distinguish actions for mere damages from actions to rescind contracts, and to recover money, or property, obtained by the firm by misrepresentation.

**Actions for deceit.*—An action for damages for misrepresentation cannot, as a general rule, be maintained, unless the misrepresentation is fraudulent, *i. e.*, false, and known so to be to the person making it, or false, and made recklessly, without any reasonable ground for believing the statement to be true. (*k*) There is, therefore, a difficulty in holding any person liable to such an action, unless actual fraud by him can be proved. On the other hand, it is difficult, if not impossible, to draw any sensible distinction between the case of fraud and any other wrong; and the weight of authority certainly is in favor of the proposition that actions for damages will lie against a principal for the fraud of his agent committed in the course of his employment, and for his principal's benefit. (*l*) This doctrine obviously renders a firm liable in an action of damages for the fraud of one of its members, if committed by him in transacting the business of the firm, and for its benefits; but not otherwise. (*m*) [*163

Other actions based on fraud.—Whatever doubt there may be as to the liability of a firm to an action for deceit, founded on the fraudulent statement of one of its members, there is no doubt that a firm can be compelled to restore property, or refund money, obtained by it by the misrepresentation of one of its members. Nor in such a case is it

(*k*) See the cases in the next two notes, and Pollock on Torts 236, &c. One exception is obscured by being referred to an implied warranty. Lewis *v.* Nicholson, 18 Q. B. 503; Collen *v.* Wright, 8 El. & B. 647, and 7 Id. 301; Fairbank's Executors *v.* Humphreys, 18 Q. B. D. 54.

(*l*) Barwick *v.* English Jt. St. Bank, L. R., 2 Ex. 259; Weir *v.* Bell, 3 Ex. D. 238; Swire *v.* Francis, 3 App. Cas. 106; Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317; Mackay *v.* Commercial Bank of New Brunswick, L. R., 5 P. C. 412; Addie *v.* Western Bank of Scotland, L. R., 1 Sc. & Div. App. Cas. 145, are the leading cases on this subject. As will be seen from them, opinions on the point greatly differ. See Pollock on Torts 83, and the next note.

(*m*) See British Mutual Bank Co. *v.* Charnwood Forest Rail. Co., 18 Q. B. D. 714, where the defendants were held not liable for a fraudulent statement made by their secretary, although made in answer to inquiries which it was his apparent duty to answer. See, also, Barnett, Hoares & Co. *v.* South Lon. Tramways Co., 18 Q. B. D. 815. Compare the cases in the last note.

necessary to prove that the misrepresentation was fraudulent as well as false. (*n*)

*164] *In Rapp *v.* Latham (*o*) the defendants, Parry and Latham, were in partnership as wine and spirit merchants, and the plaintiff employed them to purchase wine for him on commission, and to sell the same as opportunity might offer. Parry was the active partner, and he alone attended to the business of the firm. He from time to time represented that he had effected purchases and sales on the plaintiff's account, and he remitted to the plaintiff balances alleged to be due to him on the pretended sales. The plaintiff had advanced £126,000, to be laid out in the purchase of wines, and he had received, on account of pretended resales and profits arising therefrom, £130,000. There was, however, a considerable sum advanced by the plaintiff still unaccounted for, but which the defendant Parry alleged had been invested in the purchase of wine at so much a pipe, and to recover this sum the action was brought against Parry and his copartner. No purchase or sale had ever been made by Parry, and the whole of his representations to the plaintiff were false and fraudulent. It was contended by Latham that he was not affected by the fraud of his copartner, inasmuch as the fictitious purchases and sales were not in the ordinary course of trade, and were not, therefore, partnership transactions. But it was held that he was bound by the acts and representations of his partner, Parry, and could not be allowed to say that those transactions were fictitious which Parry had represented to be real. The plaintiff was adjudged entitled to retain the £130,000 remitted to him, and to recover back the advances for the supposed purchases in respect of which there had been no remittance.

Again, where one of several partners in a patent induced the plaintiff, by false and fraudulent representations, to pay £3000 for part of the profits to be obtained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one. (*p*)

*The case of Blair *v.* Bromley, (*q*) already alluded to, is another instance in point, and was in fact decided by the Lord [*165

(*n*) See Arkwright *v.* Newbold, 17 Ch. D. 301; Redgrave *v.* Hurd, 20 Ch. D. 1.

(*o*) 2 B. & A. 795. The action was for money had and received, and a set-off was pleaded.

(*p*) Lovell *v.* Hicks, 2 You. & C. Ex. 46 and 481.

(*q*) 5 Hare 542, and 2 Ph. 354, *ante* p.*153.

Chancellor expressly upon the ground that persons who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all consequences of non-performance; and as one partner may bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is, on equitable principles, considered as having all the consequences of one. [45]

45. False representations of partner. —A partnership is liable for the false and fraudulent representations of one of its members relative to matters falling within the scope of its business, and much more so when the representations are true; and an innocent third party has a right to regard such representations as true, and to act upon them. Stockwell *v.* Dillingham, 50 Me. 442.

Thus, if one partner, in the name of the firm, makes a false representation as to a fact, under circumstances precluding him from disputing it, the firm and all its members will be equally precluded, if the fact is of such a kind that the representation would be binding on the firm if true, and concerning the truth of which the firm and its members possess peculiar means of knowledge, not enjoyed by the person to whom the representation is made. Coleman *v.* O'Neil, 1 N. W. Rep. 846. But a silent partner, not knowing, or assuming to know, as to the truth or falsity of a statement of the condition of the firm made by one of the active partners, to a person who purchased an interest in the firm on the faith of such statement, is not liable to such person for damages arising from fraud in the statement. Chamberlin *v.* Prior, 1 Abb. (N. Y.) App. Dec. 338. S. P., Schwabacker *v.* Riddle, 84 Ill. 517. So, also, where one partner makes a representation to a person who subsequently purchases commercial paper of the firm from a third party, without any intimation that the latter intends to make such purchase, this does not render the partners liable individually, although it is false. In Re Schuehardt, 15 Bankr. Reg. 161.

One of a firm of warehousemen falsely represented, to a person who advanced money on the faith of such representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage with the firm a certain quantity of grain, The innocent partners were held bound by the representation, and responsible for the money advanced. Griswold *v.* Haven. 25 N. Y. 595.

In an action against a partnership for fraudulent representations made by one of its members, a declaration alleging that he, acting in behalf of the firm, procured a writ of replevin to be brought in the name of a third person and signed his own name to the replevin bond as surety, and that he declared to the plaintiff, who was a deputy sheriff, that the firm was responsible, and that his signature to the bond bound the firm, and that he was authorized by the firm to bind it by his signature alone, and thus induced the plaintiff to accept the bond and serve the writ, whereby the firm obtained and disposed of the goods replevied for its own benefit, and that judgment was rendered for the defendant in replevin, and the goods were not returned, and the firm was not bound by the signature to the bond, and the plaintiff has been held liable for taking an insufficient bond, does not set

False accounts rendered by one partner.—Whether accounts rendered by one partner in the name of the firm and showing that money is in the hands of the firm, when in truth he has misapplied it, are to be treated as representations by the firm, is a question which has given rise to much discussion and upon which the cases are not uniform. But, upon the whole, it is conceived that if the accounts relate to matters within the scope of the partnership business, the firm is bound by them. (*r*)

Statutory exceptions.—By 9 Geo. IV., c. 14, § 6, a firm is not liable for a false and fraudulent representation as to the character or solvency of any person unless such representation is in writing, signed by all the partners. The signature of one partner in the name of the firm will not bind any one but himself. (*s*)

Liability of firm for untrue statement as to authority.—If a partner, acting apparently beyond the limits of his authority, untruly represents that he is acting with his copartners' consent, they are not bound by this representation, nor are they liable for what may be done on the faith of it.

Therefore, in Ex parte Agace, (*t*) where one partner gave partnership bills in payment of his own separate debt, and, on *being asked whether his copartner was acquainted with the transaction, untruly replied that he was, and that he consented to it, it was held that the bills were not provable against the joint estate of the firm, they not being in the hands of a *bona fide* holder for value, without notice of the circumstances under which they had been given. In this case, the partner who gave the bills did that which was clearly not within the scope of his authority, and the person who took them knew it. The latter was, it is true, misled by the false answer to his

*166]

forth sufficient facts to charge the other partner for the fraud. Gray *v.* Cropper, 1 Allen (Mass.) 337.

As to the liability of one partner for the fraudulent representations of his copartner, and when his liability therefor is not affected by a discharge in bankruptcy, see Bradner *v.* Strang, 23 Hun (N. Y.) 445.

(*r*) See the last two cases, and Rapp *v.* Latham, 2 B. & A. 795, *ante* p. *164; Marsh *v.* Keating, 2 Cl. & F. 250; Devaynes *v.* Noble, Baring's case, 1 Mer. 611; De Ribeyre *v.* Barclay, 23 Beav. 107. See, on the other hand, Hume *v.* Bolland, 1 Cromp. & M. 130; Sims *v.* Brutton, 5 Ex. 802.

(*s*) See Swift *v.* Jewsbury, L. R., 9 Q. B. 301, reversing Swift *v.* Winterbotham, L. R., 8 Q. B. 244. In this case, the letter was signed by A B, manager, but the words of the statute, as construed by the Court of Appeal, warrant the statement in the text.

(*t*) 2 Cox 312.

question, but that answer was not referable to a matter within the scope of the partnership business; and the other partner did nothing to lead to the supposition either that he was a consenting party or that he had authorized his copartner to say that he was. (*u*)

Untrue statement as to nature of business.—A question of more difficulty arises when a partner alleges that the business of the firm is more extensive than it really is, or that it is different from what it is. But even in this case the firm would probably be held not liable for such a misrepresentation. *Ex hypothesi*, the representation is not referable to anything falling within the scope of the partnership business; and it would probably be contended in vain that each partner was impliedly authorized by his copartners to answer questions as to what business they really carried on in partnership. If the person seeking to make the firm liable knew anything of the firm, and of its business as ordinarily carried on, then Ex parte Agace is an authority to show that he could not succeed. If he knew nothing of the firm, he would be in the position of a person dealing with an agent whose authority is wholly unknown. Now, an agent whose authority is wholly unknown cannot bind his principal by misrepresenting the authority conferred; (*v*) and it is difficult, therefore, to see upon what principle a partner could, in the case now supposed, bind the firm by misrepresenting his authority, or by misrepresenting the nature of the business of the firm which, as to strangers, determines that authority. A member of a banking *firm could hardly bind it by underwriting a policy in the name of the firm, and by untruly representing that he and his partners were insurers as well as bankers. [*167

Fraud inducing a person to join a firm.—It is not necessary, in order to carry on the business of a firm in the ordinary way, that any of its partners should have power to induce other persons to join the firm. Hence, if one partner induces a person by fraud to join the firm, such fraud cannot be imputed to the firm, unless the partner in question had express authority to seek for a new partner, or unless the other members of the firm ratify the fraud when made aware of it. If, however, the incoming partner has brought in money to the firm,

(*u*) See, also, Kendal *v.* Wood, L. R., 6 Ex. 243, and per Kelly, C. B., in Mahony *v.* East Holyford Mining Co., L. R., 7 H. L. 879, 880.

(*v*) See Story on Agency, § 134, &c. The case supposes that *all* that is known about the agent's authority is what he himself says.

a retention of the money by the firm, with knowledge of the fraud, would amount to a ratification thereof, and would be equivalent to a fraud by all the partners in the first instance. Hence they cannot retain the money, as has been already seen. (*x*)[46]

SECTION IV.—LIABILITY OF PARTNERS IN RESPECT OF ACTS WHICH ARE UNAUTHORIZED AND ARE KNOWN SO TO BE.

Excess of authority.—By law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who know nothing of the real limits of his authority. If his copartners have restricted his authority to narrower limits, which they are perfectly at liberty to do,(*y*) still they will be bound to all persons dealing with him *bona fide* without notice of the restriction, so long as he acts within the wider limits set by law, as above explained. On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by law, a more extensive authority must be shown to have been actually conferred upon him by the other partners, and if no sufficient authority can be shown, the firm will not *be liable, even though the person seeking to charge it had no notice of the real authority possessed by the partner with whom he dealt.[47]

*168]

Notice of want of authority.—The immateriality of notice of want of authority in the last case, and its materiality in the former, is a

(*x*) See Lovell *v.* Hicks, 2 Yon. & C. Ex. 46, 481, noticed *ante* p. *164.

46. Fraud inducing a person to join the firm.—The assent of a member of a particular firm is necessary to engage him as a member of a new firm; and the general authority given by all to each, or even to the acting or managing partner, to bind the whole company, does not extend to the erection of new companies, composed of new members. Tabb *v.* Gist, 6 Call (Va.) 279.

(*y*) See *infra*.

47. Excess of authority.—Every partner possesses fully an absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from them; and, as between the firm and third parties who deal with it in good faith and without notice, it is a matter of no consequence whether the partner is acting fairly with his copartners in the

necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorized by the other members. Now, as by

transaction or not, if he is acting within the apparent scope of his authority and professedly for the firm. Pahlman *v.* Taylor, 75 Ill. 629.

A stipulation in partnership articles, restrictive of this general authority, *e. g.*, that one partner shall not contract debts without the consent of the other, does not affect third persons dealing with the firm in the usual course of business, unless knowledge thereof is brought home to them. Frost *v.* Hanford, 1 E. D. Smith (N. Y.) 540; Davis *v.* Richardson, 45 Miss. 499.

Thus, if a partner expends money drawn by him, upon his own account, from the firm's funds, in improvements on his wife's separate property, and in payment of interest upon a mortgage upon said property, and there is no proof that it was done surreptitiously, fraudulently, or without the knowledge of the copartner, the copartner is not entitled to a lien upon the wife's property. Sharp *v.* Hibbins (N. J.), 9 Atl. Rep. 113.

But it is held in South Carolina that an authority to one of a partnership to settle the affairs, receive and pay the debts, does not warrant his drawing a bill or giving a note in the partnership name. Martin *v.* Walton, 1 McCord (S. C.) 16; Bank of South Carolina *v.* Humphreys, Id. 388. See, also, Bryan *v.* Tooke, 60 Ga. 437; Pate *v.* First Nat. Bank, 63 Ind. 255.

So, a partner cannot appropriate partnership assets on the ground of indebtedness of the partnership to himself, without assent of the copartners. Saylor *v.* Mockbie, 9 Iowa 209. And the appropriation of such funds by the active partner to the rebuilding of a house for purposes of speculation, transcends the range of partnership transactions, and unless sanctioned by the copartner, the funds so expended would be properly charged to the active partner as so much appropriated to his private use, and the rents of the house would belong to him, otherwise the rents would be accounted for as partnership assets. Roberts *v.* Totten, 13 Ark. 609. Again, an assignment by one partner of a debt due to the partnership to another partner for his benefit individually, is not binding on the other partners. Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442.

Where the partnership is a special one, the power of each partner, in regard to dealings with third persons who have notice of the terms, is special. But even in such cases, if the terms are violated and the transaction enures to the benefit of the partnership, the firm is liable. Johnson *v.* Bernheim, 76 N. C. 139.

Where a partner made a gift of two-thirds of a crop of corn to his son, who took it and appropriated it to his own use, it was held, in an action by the other partner in the name of the firm for his own use to recover his share of the value of the corn, that a partner cannot make a valid gift of partnership property, to the prejudice of his partner, and that *assumpsit* can be maintained against the donee for the value of the partnership property so given. Daniel *v.* Daniel, 9 B. Mon. (Ky.) 195.

B. and S. were interested in a factory as creditors of the proprietor. B. entered into a contract, on behalf of himself and S., to pay for materials furnished for the use of the factory. It did not appear that S. knew of the contract entered into by B., or that either had authority to pledge the credit of the other. *Held*, that S. was not bound. Green *v.* Burton (Vt.), 10 Atl. Rep. 575.

law they are held *prima facie* to authorize all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character, unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not *prima facie* authorized by it, an actual authority by it must be shown; and, if this cannot be done, no case is made out against the firm, however ignorant the person seeking to charge it may have been of what was authorized, and what was not. In the case now supposed, the firm did not mislead him; and, if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner; (*z*) just as when an agent untruly represents his authority, a person dealing with him acquires no right against the principal, but must look to the agent for indemnity. (*a*)

From the above observations, it follows that actual notice of excess of authority becomes important only where the firm seeks to escape liability for some act done by one of its members, with the apparent but without the real authority of the others. So long as one partner does nothing beyond the scope of his apparent authority, as determined by the principle already explained, so long is the firm responsible for his conduct, although he may have acted beyond or in direct violation of the authority within which his copartners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not affect non-*partners, who act [*169
bona fide, and without notice of the restriction. (*b*) If, for example, the business of a firm requires a subdivision of labor, and it is agreed between the partners that one shall attend to one department, and another to another, the firm will nevertheless be bound by the acts of one of the partners out of his department, provided they are such as, on the principles already explained, would be binding on the firm. (*c*) [48]

(*z*) *Ante* p. *164, *et seq.*; see, too, Lloyd *v.* Freshfield, 9 Dowl. & R. 19.

(*a*) See, as to the liability of the agent in such a case, Collen *v.* Wright, 7 El. & B. 301, and 8 Id. 647; and *ante* p. *163, note (*k*).

(*b*) As regards such persons, it is of no use for one partner to tell the others he will not be bound by their acts. See Gleadon *v.* Tinkler, Holt N. P. Cas. 586. It is otherwise where there is notice. See Ex parte Holdsworth, 1 Mont., D. & D. 475.

(*c*) Morans *v.* Armstrong, Arms., M. & O. Ir. N. P. Rep. 25.

48. **Notice of want of authority.**—

Cases of fraud on firm, but no notice of it.—So, if one partner acts in fraud of his copartners, still they will be bound if he has not exceeded his apparent authority and if the person dealing with

Chancellor Kent, in referring to this subject, says: "All partnerships are more or less limited. There is none that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise, if the subject matter of the contract was consistent with the partnership business; and the defendants in that case would be bound to show that the contract was out of the regular course of the partnership dealings. When the business of a partnership is defined, known or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstances of partnership to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals; and when a person takes a partnership engagement without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority or its regular course of dealing, he is, in judgment of law, guilty of a fraud." 3 Kent Com. 41–44.

So, also, in St. Nicholas Nat. Bank *v.* Savery (45 N. Y. Super. Ct. 97), it is said that when a party takes negotiable paper, made, accepted or endorsed by one of several partners in or with the partnership name, and the fact that such name was not signed or endorsed in the regular course of the business of the firm is apparent on the face of the instrument or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of want of authority in the individual partner to bind the firm without their express assent. But when the fact, though existing, that such name was not signed or endorsed in the regular course of the business of the firm is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury either that the circumstances of the case did not constitute notice to him, or, that if they did, the other members of the firm assented to the transaction. And when the fact, though existing, that such name was not signed or endorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction

him had no notice of the fraud. Thus, in Bond *v.* Gibson, (*d*) where one partner ordered goods on the credit of the firm and immediately pawned them for his own benefit, the firm was held liable

appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case the burden is shifted upon the defendant to establish notice. Compare Union Nat. Bank of Rahway *v.* Underhill, 21 Hun (N. Y.) 178; Atlantic State Bank *v.* Savery, 18 Id. 36.

In applying these principles, it has been held that a forced sale by one partner of the property of the firm, not in the course of its business, confers no title on the purchaser who buys with notice of the nature of the transaction. Wallace *v.* Yeager, 4 Phil. (Pa.) 251. Such a purchaser becomes a trustee for the benefit of the firm and its creditors; and if the joint funds are employed by one partner to purchase property, either in his own name or that of another, with the intent to defraud his copartner, or the creditors of the firm, the property so purchased will be treated as trust funds for the firm and its creditors. Stegall *v.* Coney, 49 Miss. 761.

The question is whether the person dealing with the partner either knew or *ought to have known* of his transcending his authority. Bays *v.* Conover, 105 Ind. 415. Thus, in the case of a partnership in the execution of a single contract, it is beyond the power of one of the partners, in closing up the partnership affairs, to take a note for money due under the contract, payable to himself individually for his own use, and extending the time of payment without interest; and the giving of such note is no defence to an action brought by the partnership on the original debt before the expiration of the extension. Lemiette *v.* Starr (Mich.), 33 N. W. Rep. 832.

Who chargeable with notice.—Where a member of a firm of dealers in dry goods sold a judgment in favor of the firm for corn, this was held to be a misapplication of the effects of the partnership; that the purchaser was chargeable with a knowledge of the fact; and that, by his contract, he took no right to receive the proceeds of the judgment. Vance *v.* Campbell, 8 Humph. (Tenn.) 524. S. P., Drake *v.* Thyng, 37 Ark. 228. So, also, where one partner pays his individual debt with the check of the firm, this is notice to the creditor that the funds of the firm are used in making the payment, and puts upon him the *onus* of showing the assent of the other partners. Davis *v.* Smith, 27 Minn. 390.

Giving firm paper as security, for accommodation.—In Laverty *v.* Burr, 1 Wend. (N. Y.) 529, 531, Mr. Justice Sutherland, in delivering the opinion of the court, said: "Hosmer, the agent of the plaintiffs, took the note in question for a debt due from Allen, the maker, to them. He refused to take Allen's note without security. The security given was the endorsement of Burr and Baldwin, the defendants, and of Smith and Jenkins, the second endorsers. The plaintiffs, therefore, knew, when they took the note, that the endorsement of

(*d*) 1 Camp. 185.

for the price of the goods. So, if one member of an ordinary trading partnership draws, accepts or endorses a bill in the name of the firm, but for some private purpose of his own, and in fraud of his

the defendant was made by one of the partners in the name of the firm, as security for Allen, and not for a debt due from the firm. The partner who did not sign the note is not bound by it under such circumstances, unless he was previously consulted and assented to the transaction; and the burden of proving that the partner who did not sign the note consented to be bound is thrown on the creditor. Dob *v.* Halsey, 16 Johns. (N. Y.) 34, and Foot *v.* Sabin, 19 Id. 154. In England, the assent of all the partners is presumed, and the burden of avoiding the security is thrown on the firm, and they are required to prove that the note was signed by one of the partners on his individual account, without the knowledge and against the consent of the others, and that the creditor knew that fact when he took the paper of the firm. Here the *onus probandi* is thrown on the creditor. The law upon this subject is very fully considered and clearly established in the cases referred to, and also in Livingston *v.* Hastie, 2 Cai. (N. Y.) 246; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, and Livingston *v.* Roosevelt, 4 Id. 251. The only distinction between this case and that of Foot *v.* Sabin, 19 Johns. (N. Y.) 154, is this: In that case the note was signed by one of the partners in the name of the firm as sureties; here it was endorsed; and it was urged, upon the argument of this cause, that in every general partnership each member necessarily possesses the power of signing or endorsing negotiable commercial paper in the customary way of business, though the power of pledging the firm as sureties for third persons may not exist. The form of the transaction cannot be material, except by way of evidence. When paper is signed by one partner in the name of the firm, as sureties for a third person, it carries on the face of it evidence that it was not given for a partnership debt, and proof of that fact becomes unnecessary. But when it is signed or endorsed in the ordinary manner, such proof must be given. But when the fact is established that it was not given for a partnership debt, and that the person to whom it was passed knew it, no matter what the form of the instrument is, it does not bind the partners who did not sign or assent to it. In this case the assent of Baldwin is not shown, and he is therefore entitled to judgment." S. P., Hendrie *v.* Berkowitz, 37 Cal. 113; Lang *v.* Waring, 17 Ala. 145; New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574; Marsh *v.* Thompson, 2 Ill. App. 217; Darling *v.* March, 22 Me. 184; Atlas Nat. Bank *v.* Savery, 127 Mass. 75; Heffron *v.* Hanaford, 40 Mich. 305; Tutt *v.* Addams, 24 Mo. 186; Dounee *v.* Parsons, 45 N. Y. 180; Tanner *v.* Hall, 1 Pa. St. 417. But compare Freeman *v.* Ross, 15 Ga. 252; Flemming *v.* Prescott, 3 Rich. (S. C.) 307.

Rights of innocent holders of such paper.—When the course of business is such as to induce an honest belief that a partner, professing to act for his firm, has authority to sign the firm name to a note, the firm cannot impeach a note thus given to one taking it in faith of the existence of such authority. Kelton *v.* Leonard, 54 Vt. 230. But where a partner makes a note in the name of his firm, without the knowledge or consent of his partner, and not in the course

copartners, they will be liable upon the bill at the suit of any holder for value, without notice of the fraud. (*e*) So, as has been already seen, if one partner fraudulently misapplies money for which the firm is answerable, the firm is liable to make it good, although the other partners may have been grossly deceived, and may themselves have been morally blameless. (*f*) [49]

of partnership business, one seeking, as endorsee, to recover the amount of the note against the other partner must show that he took it before maturity, for value and in good faith, and mere proof that the note "was passed to the plaintiff for goods sold" is not sufficient. Clark *v.* Dearborn, 6 Duer (N. Y.) 309.

A note payable to partners in their individual names, and assigned by one of the partners in the name of the firm, may be given in evidence by the assignee, in a suit against the maker, without proof of the authority of the partner who assigned it, although "non-assignment" is pleaded. Mick *v.* Howard, 1 Ind. 250.

A and B being partners in trade with S and others, A made a promissory note, in the name of the firm, payable to B, to secure an alleged balance due from the firm to B, without the knowledge or consent of S. B endorsed the note to a third person. *Held*, that though no action would have lain by B, yet the endorsees might bring an action against the firm as makers. Smith *v.* Lusher, 5 Cow. (N. Y.) 688.

A was a member of two firms; he wrote a note to himself, signed the name of one firm, endorsed it by his own name, and by the name of the other firm. *Held*, that these facts were not such as required a holder for value before maturity to prove that the partners assented to the endorsement, or that the proceeds were used for their benefit. Ihmsen *v.* Negley, 25 Pa. St. 297.

(*e*) Ex parte Bushell, 3 Mont., D. & D. 615; Ex parte Meyer, De G. 632 (an accommodation bill); Lane *v.* Williams, 2 Vern. 277; Wintle *v.* Crowther, 1 Cromp. & J. 316; Thicknesse *v.* Bromilow, 2 Id. 425; Ridley *v.* Taylor, 13 East 175; Sanderson *v.* Brooksbank, 4 Car. & P. 286; Lewis *v.* Reilly, 1 Q. B. 349; Sutton *v.* Gregory, 2 Peake 150; Swan *v.* Steele, 7 East 210. See, as to the plea of *non accepit*, Jones *v.* Corbett, 2 Q. B. 828. It is now settled that if a bill is drawn or accepted by one partner in fraud of the firm, the holder cannot recover against the firm unless he can show that he gave value for the bill. Hogg *v.* Skene, 18 C. B. (N. S.) 426, explaining Musgrave *v.* Drake, 5 Q. B. 185, which was supposed to be to the contrary. See, also, Bailey *v.* Bidwell, 13 Mees. & W. 73; Smith *v.* Braine, 15 Jur. 287, Q. B., and 16 Q. B. 244; Harvey *v.* Towers, 6 Ex. 656; Berry *v.* Alderman, 14 C. B. 95; Heath *v.* Sansom, 2 B. & Ad. 291.

(*f*) *Ante* p. *151, *et seq.*

49. **Fraud on firm, but no notice of it.**—It is a part of the elementary principles we have been considering in this chapter that a partner is bound by the act of his copartner, within the scope of the business of the firm, even if that act be fraudulent as between the partners. Capelle *v.* Hall, 12 Bankr. Reg. 1. Thus, where one partner makes a note in the name of the firm, the firm are liable to the holder if he has no actual

*170] **Liability of retired partner in the absence of notice.*—Upon the same principle, if a person known to be a partner retires and does not notify his retirement, he will continue to be bound by the acts of his late partners as if his partnership with them continued. (*g*)

Cases of restricted authority and notice of it.—On the other hand, a person who has notice that the authority of a partner is restricted, cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted. (*h*) Therefore, where the defendant, who was in partnership, sent the plaintiff a circular telling him not to supply goods to the firm without the defendant's written order, and the plaintiff, notwithstanding, supplied goods to the defendant's partner, it was held that the defendant was not liable for the goods. (*i*) So, the authority of any partner to accept bills in the partnership name may be determined by a public notice,

knowledge, suspicion or cause of suspicion of any fraud upon the partnership in the making of the note. Blodgett *v.* Weed, 119 Mass. 215. And where promissory notes, offered by the acting partner at a bank, in the usual course of partnership business, are discounted, and the money is subsequently misapplied, the holders, not being privy thereto, have a right of action against the dormant partners. Winship *v.* Bank of United States, 5 Pet. (U. S.) 529.

One partner in an ordinary trading firm can bind the firm for a loan despite a secret agreement among the partners to the contrary, unknown to the lender; and the latter will not be chargeable with notice of any want of authority by the fact that after the loan the note given therefor was signed only by the partner negotiating the loan, and endorsed by him in the firm name. Benninger *v.* Hess, 41 Ohio St. 64. S. P., Redlon *v.* Churchill, 73 Me. 146; S. C., 40 Am. Rep. 345.

The firm of C. F. P. & Co. made their promissory note payable to their order, and endorsed the same. L., one of the firm, and also a member of the firm of J. S.'s Sons, endorsed his own name and the name of the latter firm thereon, without their knowledge or consent, and delivered it to a firm to whom he was individually indebted, to be applied upon the debt, who transferred the note to plaintiff for value before maturity, plaintiff having no notice of the circumstances attending the execution of the note. In an action against the members of the firm of J. S.'s Sons upon the endorsement—*Held*, that the defendants were liable. Atlantic State Bank *v.* Savery, 82 N. Y. 291; affirming 18 Hun 36.

(*g*) This subject will be alluded to hereafter, see chapter 2, § 3.

(*h*) Alderson *v.* Pope, 1 Camp. 404, stated and observed upon hereafter.

(*i*) Willis *v.* Dyson, 1 Stark. 164; Minnit *v.* Whitney, Vin. Ab., "Part.," A, pl. 12, and 5 Bro. P. C. 489. See, too, Vice *v.* Fleming, 1 Yon. & J. 227; Ex parte Holdsworth, 1 Mont., D & D. 475.

and such notice will affect those whom it reaches, subject to the qualification that an endorsee with notice may avail himself of the ignorance of his endorser. (*k*)

In Galway *v.* Mathew (*l*) the defendants, Mathew and Smithson, were partners; Smithson caused an advertisement to be published, warning all persons not to give credit to Mathew on his, Smithson's, account, and stating that he would not be liable for any bills or notes issued by Mathew in the name of the partnership. The plaintiff had seen this advertisement, but he was nevertheless prevailed upon by Mathew to accept a bill for the accommodation of the firm, taking in exchange a promissory note drawn by Mathew in the name of the firm. Mathew got the bill discounted, and *bona fide* applied almost all of the money thus procured in payment of the debts of the firm. The plaintiff paid his acceptance at maturity, and *then brought an action against the firm on the note. [*171
But it was held that, having seen the advertisement, he could not recover. 50

(*k*) Rooth *v.* Quin, 7 Price 193.

(*l*) 1 Camp. 402, and 10 East 264. See, too, Ex parte Holdsworth, 1 Mont., D. & D. 475, where the drawer of bills accepted by the firm had notice that they were accepted without authority. See, further, on this point, *infra*, p. *174.

50. Restricted authority and notice of it.—Mr. Gow, in his excellent work says (pp. 48, 49, 3d ed.): "On the subject of negotiable instruments, it remains to be observed that even in transactions in which all the partners are interested the authority of one partner to make, draw, accept, or endorse promissory notes or bills of exchange in the joint name is only implied, and may therefore be rebutted by express previous notice, to the party taking a joint security from one partner, of his want of authority, or that the others will not be liable upon it. Such a power is not indispensably essential to the existence of a partnership; the partners may stipulate between themselves that it shall not be exercised; and if a third person, apprised of such stipulation, will take a joint security, he cannot sue the firm upon it, although it were truly represented to him, by the partner giving the security, that the money to be advanced on it was required for the purpose of, and was in fact, applied in liquidating the partnership debts; much less can he hold the firm responsible on a security so obtained, if he take it in defiance of a positive notice, previously given by one of the members, that he will not be answerable for any bill or note signed and negotiated by the others. And the power of one partner to bind the firm by a negotiable security, where it is capable of being exercised, is only co-existent with the duration of the partnership itself; for, immediately on its dissolution, the power ceases."

So, also, Lord Ellenborough, in Galway *v.* Mathew (10 East 264), remarked: "The general authority of one partner

Restricted powers not inconsistent with continuance of partnership. —It will be observed that in these cases the notices were effectual, though the partnership was not determined. The continuance of

to draw bills or promissory notes to charge another is only an implied authority; and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice, previously given to him by one of them, that he will not be liable for any bill or note signed by the others."

Mr. Gow further says: "So, if the person with whom the single partner deals is at the time conscious of the misconduct of that partner in pledging the joint name to a separate transaction, he cannot enforce against the firm any claim that may arise to him out of such dealings. Neither can he call upon the firm to fulfill a contract which has been made by one partner, if he be privy to a private agreement between the partners themselves, the effect of which is to throw the responsibility upon the single partner alone. Therefore, where four persons are partners in a coach concern, but one, by agreement, provides the coaches at a certain rate per mile, he alone is responsible for repairs done to the coach by a person cognizant of this arrangement, although the names of all four appear on the vehicle. So, if it be notorious that the proprietors have separate departments and interests, they must be sued separately by the tradesmen who may supply each with goods"

The implied authority of one partner to bind his copartner by contract may be revoked by refusal of the latter to be thus bound, communicated to the party in whose favor the contract is to be made. Leavitt *v.* Peck, 3 Conn. 124.

The partnership relation makes each partner the agent of the others, when acting within the scope of his power; but when his agency is denied, and his act forbidden by his copartner, with notice to the party assuming to deal with him as the agent of the firm, his act is not that of the firm, but his individual act only. Yeager *v.* Wallace, 57 Pa. St. 365.

Evidence, both direct and circumstantial, is admissible to prove that the sole power of conducting the business of a firm has been given to one partner. Such power may be inferred from the conduct of the partners for a series of years, as, that one has exclusively conducted the business of the firm, and the other partner has never questioned his acts, or assumed to conduct the business himself. It is proper to show any reason existing, or expressed by the partners, why it was not desirable or desired that the other should conduct the business, as, that he had little interest in the concern, while the interest of the managing partner was large. Anthony *v.* Wheatons, 7 R. I. 49.

One partner cannot, in violation of known stipulations in the articles of partnership, bind the firm even for money which is applied in liquidation

the partnership is not inconsistent with a notice by one partner that as to some particular matter he will not be bound by the acts of his copartner. (*m*)

Bills accepted in name of firm for private debt.—Again, a person who knows that a partner is using the name or assets of the firm for a private purpose of his own, knows that he is *prima facie* committing a fraud on his copartners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes, if one partner accepts a bill or makes a note in the name of the firm, and gives the bill or note in payment of a private debt of his own, the creditor who takes the bill or note, knowing the circumstances under which it has been accepted or made, will not be able to enforce it against the firm, unless it was, in fact, given with the authority of the other partners, which it is for the creditor to prove. (*n*) And if a bill is drawn by one partner

of the debts of the firm. Langan *v.* Hewett, 13 Sm. & M. (Miss.) 122.

If one of two attorneys constituting a firm, practicing only in the city of Baltimore, receive, from one aware of this limitation, a note for collection in Carroll county, the firm will not be responsible unless the privity of the other partner is shown. Brent *v.* Davis, 9 Md. 217.

If a firm consists of but two partners, each having an equal voice in the direction and control of the common business, either may protect himself against liability on a future contract by giving notice of his dissent to the person with whom it is about to be made; and where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting party liable, unless his liability results from the articles, or from the nature of the partnership. Johnston *v.* Dutton, 27 Ala. 245.

Where the debtor of a firm has received notice not to pay the debt to a certain member of the firm, and he afterwards takes a receipt from such member, in consideration of his discharging a debt due by the member individually to him, the transaction will not be regarded as *bona fide*, and will not discharge the debt due the firm. Sims *v.* Smith, 12 Rich. (S. C.) 685. See, also, Campbell *v.* Bowen, 49 Ga. 417; Urquhart *v.* Powell, 54 Ga. 29; Nat. Bank of Commonwealth *v.* Law, 127 Mass. 72.

(*m*) See, in addition to the cases cited in the last few notes, the judgment of L. J. Bramwell in Bullen *v.* Sharp, L. R., 1 C. P. 125, 126, and the judgment in Vice *v.* Fleming, 1 You. & J. 227.

(*n*) Leverson *v.* Lane, 13 C. B. (N. S.) 278, and 3 Fost. & F. 221; Re Riches, 4 De G., J. & S. 581, and 5 N. R. 287. See, also, Ellston *v.* Deacon, L. R., 2 C. P. 20. Older cases to the same effect are Wells *v.* Masterman, 2 Esp. 731; Green *v.* Deakin, 2 Stark. 347; Ex parte Thorpe, 3 Mont. & A. 716; Ex parte Austen, 1 Mont., D. & D. 247; Arden *v.* Sharpe, 2 Esp. 524; Ex parte Agace, 2

in the name of the firm, in fraud of his copartners, and is accepted by the drawee, and is afterwards endorsed by the drawer in the name of the firm, the acceptor may successfully deny the endorsement, although he cannot deny the drawing. (*o*)

Again, although a partner may be a *bona fide* holder, for his own separate use, of the paper of his firm, yet, if he gives such paper in payment of a separate debt of his own, this is *prima facie* an irregular proceeding, and a fraud on his copartners. Consequently, *172] the creditor taking the paper *must rebut this *prima facie* inference before he can compel the firm to pay. (*p*) A *bona fide* holder for value without notice is, of course, in a different position. (*q*) [51]

Cox 312; Miller *v.* Douglas, 3 Ross Lead. Cas. 500; Ex parte Bonbonus, 8 Ves. 540; Frankland *v.* M'Gusty, 1 Knapp 274; and see, *post* p. *173.

(*o*) Garland *v.* Jacomb, L. R., 8 Ex. 216.

(*p*) See Leverson *v.* Lane, 13 C. B. (N. S.) 278, and Re Riches, 4 De G., J. & S. 581, and 5 N. R. 287, qualifying Ex parte Bushell, 3 Mont., D & D. 615, and Ridley *v.* Taylor, 13 East 175, in which the contrary doctrine was countenanced.

(*q*) See *ante* p. *169.

51. Paying private debt with the paper of the firm.—It is an inflexible rule of the law of partnership that if a promissory note, executed by one partner in the name of the firm, be for his individual debt, which fact is known to the payee, it is not binding on the partnership. Taylor *v.* Hillyer, 3 Blackf. (Ind.) 433; Hickman *v.* Reineking, 6 Id. 388; Maudlin *v.* Branch Bank, 2 Ala. 502; Robinson *v.* Aldridge, 34 Miss. 352; Hickman *v.* Kunkle, 27 Mo. 401; Stainer *v.* Tysen, 3 Hill (N. Y.) 279; Miller *v.* Manice, 6 Id. 115; Weed *v.* Richardson, 2 Dev. & B. (N. C.) L. 535; Baird *v.* Cochran, 4 Serg. & R. (Pa.) 397; Porter *v.* Gunnison, 2 Grant (Pa.) Cas. 297; Burleigh *v.* Parton, 21 Tex. 585; Huntington *v.* Lyman, 1 D. Chip. (Vt.) 438. See Cotton *v.* Evans, 1 Dev. & B. (N. C.) Eq. 284. So, where a partner in two firms draws a bill by one firm on the other, payable to himself, for his individual debt, which is accepted by the firm, such bill cannot be recovered by the payee against the drawers or acceptors. Babcock *v.* Stone, 3 McLean (U. S.) 172. Nor can one partner, without the express concurrence of his copartner, make a note of the firm, payable to himself, and charge the firm therewith (Brown *v.* Haynes, 6 Jones (N. C.) Eq. 49); or endorse a partnership note belonging at the time to the firm, in payment of an individual debt (Fletcher *v.* Anderson, 11 Iowa 228; Fall River, &c, Bank *v.* Sturtevant, 12 Cush. (Mass.) 372); or give a firm note in renewal of an individual indebtedness. Howell *v.* Wilcox & Gibbs Sewing Machine Co., 12 Neb. 177; Lime Rock, &c., Ins. Co. *v.* Treat, 58 Me. 415.

The endorsers of a firm note made by one partner without authority and passed by him for his individual debt, are not liable for its payment. Williams *v.* Walbridge, 3 Wend. (N. Y.) 415.

Pledge of partnership goods for private debt.—As a partner has no implied authority to pledge the partnership name for purposes of his own, so neither has he, for similar purposes, any implied

What is the giving of firm paper for an individual debt.—A loaned money on the credit of B and C, which was used for the purposes of the firm, but B's individual note was given for it, and accepted by A by mistake, who, on discovering the mistake, demanded and received from B the firm note in lieu thereof. *Held*, that this was not the giving of a partnership note for an individual debt. Meader *v.* Malcolm, 78 Mo. 550. So, also, if money is borrowed by a partner in his own name, and on his own credit, and his individual note is given therefor, it is no fraud afterwards to execute the note of the firm in renewal, provided the money goes into the business of the firm. Union Bank *v.* Eaton, 5 Humph. (Tenn.) 499. And where the partnership articles provide that an existing individual debt of one of the partners shall be assumed and paid by the firm, either partner may execute the firm note to secure such payment. Randall *v.* Hunter, 66 Cal. 512.

A partnership was established composed of the members of an old firm and others, and did business, under different firm names, at Tuscaloosa, Mobile and New York. The new partnership was indebted to the old. A member of the old firm drew a bill in the name of the firm at Mobile, in payment of a debt of the old firm, on the house at New York, which was accepted in the firm name by a member of the old firm. *Held*, that this was like the payment of any other indebtedness of the partnership, and not like one partner giving a partnership note for his individual debt. Hester *v.* Lumpkin, 4 Ala. 509.

Burden of showing authority on holder of the paper.—The burden is on the holder of a note to show that the several members of a firm assented to a note, in the name of a firm, where such note is taken for the private debt of one of the partners. Bank of Commerce *v.* Selden, 3 Minn. 155; Clay *v.* Cottrell, 18 Pa. St. 408; Cooper *v.* McClurkan, 22 Pa. St. 80; Davenport *v.* Runlett, 3 N.H. 386; Foster *v.* Andrews, 2 Pa. 160; Gansevoort *v.* Williams, 14 Wend. (N. Y.) 133; Mechanics' and Traders' Ins. Co. *v.* Richardson, 33 La. Ann. 1308; Mutual Bank *v.* Richardson, Id. 1312; S. C., 39 Am. Rep. 290, 293, note; Allen *v.* Cary, 33 La. Ann. 1455; Hamilton *v.* Hodges, 30 La. Ann. 1290; King *v.* Faber, 22 Pa. St. 21; Lanier *v.* McCabe, 2 Fla. 32; Munroe *v.* Cooper, 5 Pick. (Mass.) 412; Powell *v.* Messer, 18 Tex. 401; Rust *v.* Hauselt, 41 N. Y. Super Ct. 467; Rutledge *v.* Squires, 23 Iowa 53; Tompkins *v.* Woryard, 5 W. Va. 216; Wagner *v.* Clay, 1 A. K. Marsh. (Ky.) 257; Williams *v.* Gilchrist, 11 N. H. 535; Williams *v.* Walbridge, 3 Wend. (N. Y.) 415; Wilson *v.* Williams, Id. 146. In Dob *v.* Halsey (16 Johns. (N. Y.) 34, 38) Spencer, C. J., said: "This court has decided, in several cases, that where a note is given in the name of the firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted, and consent to the transaction. Livingston *v.* Hastie, 2 Cai. (N. Y.) 246; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300; Livingston *v.* Roosevelt, 4 Id. 251. In Ridley *v.* Taylor (13 East

power to pledge its goods. Therefore, if two firms are jointly interested in consignments, and one of them pledges the bills of lading with its bankers as a security for advances on its separate

175) the Court of King's Bench held that if one partner draw or endorse a bill in the name of the partnership, it will, *prima facie*, bind the firm, although passed by one partner to a separate creditor, in discharge of his private debt, unless there be covin between such separate debtor and creditor, or, at least, the want of authority, either express or implied, in the debtor partner, to give the security of the firm for his separate debt. The only difference between the decision of this court and that of the King's Bench consists in this: We require the separate creditor, who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound; the rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove that the act was covinous on the part of the partner for whose private debt the paper of the firm was given, by showing that it was done without the knowledge and against the consent of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm. I can perceive no substantial difference, whether the note of a firm be taken for a private debt of one of the partners, by a separate creditor of the partner pledging the security of the firm, and taking the property of the firm upon a purchase of one of the partners to satisfy his private debt. In both cases the act is equally injurious to the other partners; it is taking their common property to pay a private debt of one of the partners." And again, in a later case (Foot *v.* Sabin, 19 Johns. (N. Y.) 154, 157, 158), the same judge said: "The plaintiff proves Holmes' signature to the note, and also that Wilson and Foot were partners, and that Wilson signed the name of the firm; and it appeared on the face of the note that they signed as 'sureties' to Holmes. Whether we apply this proof to the general issue or to the special plea, the plaintiff has not maintained either issue. It was incumbent on him to show that all the defendants were liable on the note, and that Wilson executed the note with the express assent and authority of Foot. In this case, it appearing that the signature of the name of the firm by Wilson was not for a partnership debt, Wilson could not bind his partner, Foot. All the cases were reviewed in Dob *v.* Halsey (16 Johns. (N. Y.) 34), and the principle established is this: that where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partner is not bound unless he has been previously consulted and has consented to the transaction; and the burden of the proof that the partner who did not sign the note consented to be bound is thrown on the creditor. The same principle applies with greater force when one of the partners becomes security for another person, and attempts to bind his copartners. The creditor is aware that he is pledging the partnership responsibility in a matter in no wise connected with the partnership business; and that is a fraud on such of the partners as do not assent expressly that the firm shall be bound. When, therefore, it appeared from the plain-

account, the bankers cannot hold those goods against the other firm if they knew when the goods were pledged what the real facts were

tiff's own showing that the note was signed by Holmes as principal, and by Wilson with the name of the firm of Wilson & Foot, as sureties for Holmes, nothing was shown to bind Foot, and the plaintiff failed to maintain the issue. On the motion for a nonsuit, the court held that the plaintiff was bound to prove the authority or consent of Foot to the making the note, which the court considered he had done. There was no proof of any authority or consent of Foot, except the proof of the siguature of Wilson of the name of the firm. The court, then, certainly drew a very incorrect legal inference from the fact proved."

In an action upon a note, signed by one of two partners in the partnership name, for a purpose not connected with the partnership, and without the knowledge of the other partner, testimony tending to show a subsequent recognition of the note by the latter is within the exclusive jurisdiction of the jury to weigh. Jones *v.* Booth, 10 Vt. 268.

Where one of two partners, during the existence of the partnership, gave a promissory note in the name of the firm for his private debt, and the other partner afterwards, knowing these facts, by a promise to pay the note, induced the holder to forbear attempting to collect it, it was held that a jury should be warranted in returning a verdict against both in an action on the note, without expressly finding that the note had been ratified by the other partner. Wheeler *v.* Rice, 8 Cush. (Mass.) 205.

Rights of bona fide endorsees, and who are deemed innocent purchasers for value.—If a partner gave a negotiable note in the name of the partnership for his own private debt, a *bona fide* endorsee of the note, who had no notice of the purpose for which it was given, may recover the amount of the copartnership. Munroe *v.* Cooper, 5 Pick. (Mass.) 412; Chazournes *v.* Edwards, 3 Id. 5; Livingston *v.* Roosevelt, 4 Johns (N. Y.) 25; Mechanics' Bank, &c, *v.* Foster, 19 Abb. (N. Y.) Pr. 47; S. C., 29 How. Pr. 408. See, also, Fuller *v.* Percival, 126 Mass. 381.

In Arden *v.* Sharpe (2 Esp. 524, 525) Lord Kenyon said: "The bill is endorsed by one partner in the name of the firm. One partner certainly may endorse a bill in the partnership name, and if it goes into the world and gets into the hand of a *bona fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable. But the case is different where the party who brings the action was himself the person who took the bill with the endorsement by one partner only, and was informed that the transaction was to be concealed from the other. He cannot sue the partnership. The transaction indicates that the money was for that partner's own use, and not raised on the partnership account; therefore, he shall not be allowed to resort to the security of the partnership, to whom, in the original transaction, he neither looked nor trusted." See, also, Chase *v.* Bean, 58 N. H. 183.

If a partner draws notes in the name of the firm, payable to himself, and then endorses them to a third party for a personal and not a partnership consideration, the first endorsee cannot maintain

respecting them. (*r*) So, if one partner pays a separate debt of his own with money of the firm, and the creditor who is paid is aware of the facts, he cannot retain the money as against the firm, unless he can prove that the payment was authorized by the other partners, or unless they have estopped themselves from denying the authority. (*s*) [52]

an action on them against the firm if he knew that the notes were antedated. Smyth *v.* Strader, 4 How. (U. S.) 404.

When a note payable to a partnership is transferred by one partner for the payment of his individual debts, the purchaser acquires only the assignor's interest, and holds the note subject in equity to the claim of the other partners; and an assignee who purchases for cash, after the maturity of the note, and while it is in the hands of an attorney for suit, relying upon his assignor's representations as to the state of accounts between his copartner and himself, and his right to dispose of the note, is affected with notice of the other partner's interest upon a settlement of the partnership accounts. Halstead *v.* Shepard, 23 Ala. 558.

An endorsee of a note endorsed by one of several partners, in the partnership name, for his individual purposes, without the consent or knowledge of the other partners, cannot avail himself of such note to subject the partnership, even if he did not know that it was endorsed under such circumstances, where his ignorance arises from gross negligence. New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574.

An endorsee who receives, six months after date, as collateral security from the payee, a note on demand, given in the name of a partnership to one of the firm, takes it subject to all the equity existing against it in the hands of the payee. Thompson *v.* Hale, 6 Pick. (Mass.) 259.

(*r*) Snaith *v.* Burridge, 4 Taunt. 684.

(*s*) Kendall *v.* Wood, L. R., 6 Ex. 243; Heilbut *v.* Nevill, L. R., 4 C. P. 354, and 5 Id. 478. See further as to such cases, *ante* pp. *165, *166.

52. Pledge of firm assets for individual debt.—The rule is well settled that a partner cannot employ the partnership funds to pay his own pre-existing debt, without the express or implied assent of the other partners. Rogers *v.* Batchelor, 12 Pet. (U. S.) 221; Pierce *v.* Pass, 1 Port. (Ala.) 232; Burwell *v.* Springfield, 15 Ala. 273; Nall *v.* McIntyre, 31 Ala. 532; Filley *v.* Phelps, 18 Conn. 294; Thomas *v.* Stetson, 62 Iowa 537; S. C., 49 Am. Rep. 148; Bourne *v.* Woodbridge, 10 B. Mon. (Ky.) 492; Jackson *v.* Holloway, 14 Id. 133; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Minor *v.* Gaw, 11 Sm. & M. (Miss.) 322; Buck *v.* Mosley, 24 Miss. 170; Steinhart *v.* Fyhrie, 5 Mont. T. 463; Dob *v.* Halsey, 16 Johns. (N. Y.) 34; Leonard *v.* Winslow, 2 Grant (Pa.) Cas. 139; Purdy *v.* Powers, 6 Pa. St. 492; McKinney *v.* Brights, 16 Pa. St. 399; Goode *v.* McCartney, 10 Tex. 193; Dana *v.* Conant, 30 Vt. 246; Sauntry *v.* Dunlap, 12 Wis. 364. Thus, one partner cannot mortgage the stock of the firm, under his control, for his individual debt (Moline Wagon Co. *v.* Rummell, 12 Fed. Rep. 658; S. C., 2 McCrary (U. S.) 307, so as to deprive his copartner of his rights in the property as security for money advanced by him for the firm, (Deeter *v.* Sellers,

Private bargain by one partner.—Another case, illustrating the want of authority of one partner to bind the firm by transactions enuring only to his advantage, is afforded by Bignold *v.* Water-

102 Ind. 458); and a subsequent *bona fide* sale of the mortgaged property for the benefit of the partnership is good as against such mortgage. Shaw *v.* McDonald, 21 Ga. 395.

In Livingston *v.* Roosevelt (4 Johns. (N. Y.) 251, 265), in speaking of this subject, Van Ness, J., said: "The distinction between general and special partnerships is probably coeval with their existence. A general rule, applicable to both, is that in transactions relating to the joint concern, one of several partners may bind the rest. He may sign notes, endorse or accept bills for the common benefit, &c., without applying to the rest in every particular case. But this authority of a single partner has its limitations. Formerly, as appears by the case of Pinkney *v.* Hall, 1 Salk. 126, and S. C., 1 Ld. Raym. 175, it was probably less extensive than at this day. One partner of the concern has no authority to pledge the partnership goods for his own debt; nor can he bind the firm to any engagements known at the time to be unconnected with and foreign to the partnership. This has not only been so settled by this court, but now is and always has been the established law in England. Not an adjudged case, nor, I believe, a single *dictum*, can be found the other way. This will appear from most of the cases which I shall presently have occasion to mention for another purpose. In special partnerships, however, this power of the individuals composing them is restricted to still narrower limits, and can only be legally exercised within the compass of that particular business to which the partnership relates. It is as circumscribed as the partnership itself. It is, therefore, analogous to that which is conferred on an agent, appointed for a special purpose, who, if he exceed his authority, cannot bind his principal. Fenn *v.* Harrison, 3 T. R. 757. This analogy is complete, in all cases, where third persons have dealings with a special partner, with notice that he is such. And, accordingly, it has been repeatedly ruled that whenever such a partner pledges the partnership funds or credit in a transaction which is known to be unconnected with, and not fairly and reasonably within the compass of the partnership, it is, as to the other partners, fraudulent and void. They, however, to entitle themselves to the protection of this rule of law must not do, or consent to, or suffer anything to be done, which may hold them out to the world as general partners; and it would always be prudent and proper (though I will not say it is indispensably necessary) to give public notice to the community that the partnership is special, and of the particular species of traffic or business to which it is confined. Willet *v.* Chambers, Cowp. 814; De Berkom *v.* Smith, 1 Esp. 29; Arden *v.* Sharpe, 5 Esp. 524; Shirreff *v.* Wilks, 1 East 48. In the case Ex parte Bonbonus, 8 Ves. 540, Lord Eldon expresses himself thus: 'I agree it is settled that if a man gives a partnership engagement in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say that though in its nature not a particular transaction, yet there was some authority, beyond the mere circumstance of partnership, to enter into that contract so as

house. (*t*) There the defendants were proprietors of a coach running between London and Norwich, and they, by notice affixed in their office, stated that they would not be accountable for any par-

to bind the partnership; and then it depends upon the degree of evidence.'"

Limits and exceptions to the rule.—Where one partner uses the effects of the firm in the payment of his private debts, with the consent and knowledge of his copartner, an action by the firm for the price of these effects will be barred. Carter *v.* Beaman, 6 Jones (N. C.) L. 44. So, while one partner cannot appropriate the partnership effects to the payment of his individual debts, yet he may say to a hotel-keeper, "Buy your groceries of us, and we will take it out, in whole or in part, in the board either of ourselves or of our clerks," and this contract will bind the firm. Perry *v.* Butt, 14 Ga. 699; and although a mortgage, by a partner, of firm property without his copartners' consent, to secure his individual debt, will not be permitted to operate as a mortgage, yet if, on a payment of the firm debts and a division of the assets of the firm, such mortgaged property falls to the mortgagor, it becomes operative and can be enforced. Smith *v.* Andrews, 49 Ill. 28.

Burden of proving consent of other partner is on the creditor.—In Frankland *v.* M'Gusty (1 Knapp 274, 301), Sir John Leach, Master of the Rolls, in delivering the opinion of the court, said: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor, who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction which may afford the separate creditor a reasonable ground of belief that the security, so given in the partnership name, is given with the consent of the other partners; and those circumstances occurred in the case which was cited, and which seemed to be inconsistent with the other authorities. I refer now to the case of Ridley *v.* Taylor. In that case the bill was dated eighteen days before its delivery by the partner to his separate creditor, and it was not known by the creditor that it was drawn and endorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The court therefore were of opinion that there was reasonable ground for the separate creditor believing it not to have been given to him in fraud of the partnership, and that the general presumption that a partnership security, when applied in payment of a separate debt, is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion. Upon a consideration, therefore, of all the authorities, I am of opinion that the law is that, taken *simpliciter*, the separate creditor must show the knowledge of the partnership; but if there are circumstances to show a reasonable belief that it was given with the consent of the partnership, it lies upon the partners to prove the fraud. I think that will reconcile all the cases."

Thus, where a promissory note, belonging to a partnership, is transferred or paid over by an individual member thereof, in satisfaction of his own private

(*t*) 1 Man. & S. 255.

cel above the value of £5, unless the same was entered and paid for accordingly. The plaintiffs were bankers at Norwich, and one of the defendants, for a consideration moving to him alone, agreed

debt, it is incumbent on the plaintiffs, in a suit brought on the note, to show the assent of the other partner, in order to bind him; and such knowledge and assent must be clearly shown, and not left to be inferred from vague and slight circumstances. Kemeys *v.* Richards, 11 Barb. (N. Y.) 312; Mecutchen *v.* Kennady, 3 Dutch. (N. J.) 230. Such assent cannot be implied from the partnership relations; it must be proved. Brewster *v.* Mott, 4 Scam. (Ill.) 378.

It is not competent to charge a firm for the act of a partner in giving firm security for an endorsement of his individual note, by evidence that at the time of obtaining the endorsement the partner stated that the money was wanted for the use of the firm. Uhler *v.* Browning, 4 Dutch. (N. J.) 79. The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so. Smith on Merc. Law, p. 44.

Rights of creditors acting in good faith.—Chancellor Kent says: "It is a well-established doctrine that one partner cannot rightfully apply the partnership funds to discharge his own pre-existing debts, without the express or implied assent of the other partners. This is the case, even if the creditor had no knowledge, at the time, of the fact of the fund being partnership property. The authority of each partner to dispose of the partnership funds, strictly and rightfully, extends only to the partnership business, though in the case of *bona fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner. But if the negotiable paper of a firm be given by one partner on his private account, and that paper, issued within the general scope of the authority of the firm, passes into the hands of a *bona fide* holder, who has no notice, either actually or constructively, of the consideration of the instrument; or if one partner should purchase, on his private account, an article in which the firm dealt, or which had an immediate connection with the business of the firm, a different rule applies, and one which requires the knowledge of its being a private, and not a partnership transaction, to be brought home to the claimant. These are general principles, which are considered to be well established in the English and American jurisprudence." This rule that the creditor's ignorance of the partnership ownership will not shield him, is also adopted in Moriarty *v.* Bailey, 46 Conn. 592; Ackles *v.* Stockle, 56 Me. 558; Liberty Savings Bank *v.* Campbell, 75 Va. 534.

The fullest discussion of this seemingly harsh rule is to be found in Rogers *v.* Batchelor (12 Pet. (U. S.) 221, 229), where Mr. Justice Story, in delivering the opinion of the court, said: "The first instruction raises these questions: whether the funds of a partnership can be rightfully applied by one partner to the discharge of his own sep-

that the plaintiffs' parcels should always go free by the coach. This agreement was acted on for some time, but it did not appear that the other defendants were aware of its existence, or of the fact

arate pre-existing debt, without the assent, express or implied, of the other partner; and whether it makes any difference, in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property. We are of opinion in the negative on both questions. The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds for which the partner is responsible to the partnership; though in the case of *bona fide* purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle; and, in our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property, or to bind the rights of another, unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds than the partner himself had. Does it make any difference that the separate creditor had no knowledge, at the time, that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud, not only in morals, but in law. That was expressly decided in Shirreff *v.* Wilks (1 East 48); and, indeed, seems too plain, upon principle, to admit of any serious doubt. But we do not think that such knowledge is an essential ingredient in such a case. The true question is whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may re-assert their claim to it in the hands of such creditor. The case of Ridley *v.* Taylor (13 East 175) has been supposed to inculcate a different and more modified doctrine. But upon a close examination it will be found to have turned upon its own peculiar circumstances. Lord Ellenborough, in that case, admitted that one partner could not pledge the partnership property for his own separate debt; and if he could not do such an act of a limited nature, it is somewhat difficult to see how he could do an act of a higher nature, and sell the property. And his judgment seems to have been greatly influenced by the consideration that the creditor in that case might fairly presume that the partner was the real owner of the partnership security, and that there was an absence of all the evidence (which existed, and might have been produced) to show that the other partner did not know, and had not

that the plaintiffs were treated differently from other people. A parcel of the plaintiffs, sent by the coach, being lost, it was held

authorized the act. If it had appeared from any evidence that the act was unknown to, or unauthorized by, the other partners, it is very far from being clear that the case could have been decided in favor of the separate creditor, for his lordship seems to have put the case upon the ground that either actual covin in the creditor should be shown, or that there should be pregnant evidence that the act was unauthorized by the other partners. The case of Green *v.* Deakin (2 Stark. 347), before Lord Ellenborough, seems to have proceeded upon the ground that fraud, or knowledge by the separate creditor, was not a necessary ingredient. In the recent case, Ex parte Goulding, cited in Coll. on Part. (1st ed.), 283, 284, the Vice Chancellor, Sir John Leach, seems to have adopted the broad ground upon which we are disposed to place the doctrine. Upon the appeal, his decision was confirmed by Lord Lyndhurst. Upon that occasion his lordship said: 'No principle can be more clear than that where a partner and a creditor enter into a contract on a separate account the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of this contract, so as to bind the firm.' There was no pretence in that case of any fraud on the part of the separate creditor. And Lord Lyndhurst seems to have put his judgment upon the ground that unless the other partner assented to the transaction he was not bound, and that it was the duty of the creditor to ascertain whether there was such assent or not. The same question has been discussed in the American courts on various occasions. In Dob *v.* Halsey (16 Johns. (N. Y.) 34) it was held by the court that one partner could not apply partnership property to the payment of his own separate debt, without the assent of the other partners. On that occasion Mr. Chief Justice Spencer stated the difference between the decisions in New York and those in England to be merely this: that in New York the court required the separate creditor, who had obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound; and that in England the burden of proof was on the other partners to show their want of knowledge or dissent. The learned judge added: 'I can perceive no substantial difference whether the note of a firm be taken for a private debt of one of the partners by a separate creditor of a partner, pledging the security of the firm, and taking the property of the firm upon a purchase of one of the partners to pay his private debt. In both cases the act is equally injurious to the other partners. It is taking their common property to pay a private debt of one of the partners.' The same doctrine has been, on various occasions, fully recognized in the Supreme Court of the same state. And we need do no more than refer to one of the latest, the case of Everingham *v.* Ensworth, 7 Wend. (N. Y.) 326. Indeed, it had been fully considered long before, in Livingston *v.* Roosevelt, 4 Johns. (N. Y.) 251. It is true that the precise point now before us does not appear to have received any direct adjudication, for in all the cases above mentioned there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think that the true principle to be extracted from the

that the contract entered into by *the one defendant was not binding on the others, and that they were not liable for [*173

authorities is that one partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not."

But there are authorities which uphold a less stringent rule. Thus, in Warren *v.* French (6 Allen (Mass.) 317) it is held that if it is within the ordinary course of a partnership business for one partner to borrow money on the credit of a firm, proof that a loan is made to the firm at their place of business, through one of the partners, at six per cent., upon a statement by the latter that the firm could use the money to advantage at that rate; that the lender took a transfer of bank stock as collateral security, and that he knew that the partner with whom he transacted the business owned real estate, in which the firm was not interested—is not sufficient to affect the lender, if he acted in good faith, with constructive notice of fraud in such partner in procuring the money for his own personal use. In Locke *v.* Lewis (124 Mass. 1) it is held that a sale by a partner, in payment of his own debt, of goods which are in fact goods of the partnership, but which the partnership has so entrusted to him as to enable him to deal with as his own, and to induce the public to believe to be his, and which the creditor receives in good faith and without notice that they are the goods of the partnership, is valid against the partnership and its creditors. And in Kellogg *v.* Fancher (23 Wis. 21) it is said that one who, in ignorance of a copartnership, takes, in payment of the individual note of a member given for his private debt, notes of third parties running to such member, but in fact the property of the copartnership, will be protected as a *bona fide* holder for value. See, also, Flannagan *v.* Alexander, 50 Mo. 50; Nichols *v.* Sober, 38 Mich. 678.

Rights of defrauded firm and its creditors.—Where a partner fraudulently, without the consent of his copartners, applies the partnership funds to his private purposes and profit, or invests the same in his own name and for his own use, his copartners may, if they can distinctly trace the investment, follow it and treat it as trust property held for the benefit of the firm by the partner or by any person in whose hands it may be, except a *bona fide* purchaser, without notice. Kelley *v.* Greenleaf, 3 Story (U. S.) 93; Croughton *v.* Forrest, 17 Miss. 131.

On the failure of a partnership, an appropriation of the joint property by one partner to pay his individual debt is fraudulent and void as against the partnership creditors. Yale *v.* Yale, 13 Conn. 185. S. P., French *v.* Lovejoy, 12 N. H. 458.

One partner has no right to assign to his separate creditors any portion of the effects of the partnership, to the prejudice of the partnership creditors. Black *v.* Bush, 7 B. Mon. (Ky.) 210.

When a banker has the funds of a firm deposited with him for the purpose of its especial business, and knows that

the loss of the parcel, its value not having been declared, as required by the notice.[53]

one of the firm is engaged in individual speculations, and transfers these funds to the separate account of this member and with a knowledge that the latter appropriates the funds to such speculations, the banker is liable to the firm for the funds thus misapplied, unless they first assure him of their consent. Billings *v.* Meigs, 53 Barb. (N. Y.) 272. See, also, Johnson *v.* Crichton, 56 Md. 103; Forney *v.* Adams, 74 Mo. 138; Hartley *v.* White, 94 Pa. St. 31; Stebbins *v.* Willard, 53 Vt. 665; Estabrook *v.* Messersmith, 18 Wis. 545; Viles *v.* Bangs, 36 Id. 131.

53. **Private bargain by one partner.**—A copartnership is not chargeable for goods sold to one of the partners for his separate use, although he ordered them to be charged to the firm, if the vendor knew at the time that they were for the sole use of that partner. Gullat *v.* Tucker, 2 Cranch (U. S.) C. C. 33; Bird *v.* Lanius, 7 Ind. 615.

So, where one partner agrees with a physician, who knows of the existence of the firm, to let the latter have goods from the partnership in payment for professional services rendered or to be rendered to such partner individually, such agreement is not binding on his copartner, or the firm, unless expressly authorized or subsequently ratified. Hust *v.* Clarke, 56 Ala. 19.

Where a partner, without the knowledge or consent of his copartners, fraudulently misapplies partnership funds to his own private trade, he will be liable to his copartners, not only for the interest on such funds, but also for the profits which he has made by them. Solomon *v.* Solomon, 2 Ga. 18.

A contract by one of two partners in the business of building houses, made without the knowledge of the other, to build a house in payment of a private debt of his own, is a fraud upon the partnership, and void, if the creditor knows that the two are partners in that business; and if both partners actually do the work, they or their assignee in insolvency may recover therefor of such creditor, without proving the terms of their copartnership, or that the partner who made the contract agreed that the work should be done by the partnership. Williams *v.* Brimhall, 13 Gray (Mass.) 462.

If a partner buys a chattel for his private use, and agrees to pay for it in goods to be delivered by his firm on the order of the seller, and the firm is changed by the addition of a new member, but continues the business of the old firm in the old place, and subsequently the goods are delivered according to the agreement, the firm cannot maintain an action for the price of the goods, though the other members of the firm were ignorant of the agreement. Tay *v.* Ladd, 15 Gray (Mass.) 296.

See, however, Greeley *v.* Wyeth (10 N. H. 15), where it was held that where one partner, without the knowledge of his copartner, makes a special contract to perform labor or sell goods of the partnership, and to take in pay specific articles for his own use; and the contract is executed by the parties who make it, an action cannot be maintained in the name of the partners, to recover the value of the goods so sold or labor performed, on the ground that the partner has no authority to make such contract.

Fraud on incoming partners.—The same principle was acted upon in the important and well-known case of Shirreff *v.* Wilks. (*u*) There, the plaintiffs sold some porter to Bishop and Wilks, who were partners, and the porter was entered in the plaintiffs' books in the names of Bishop and Wilks. Afterwards, Robson became a partner with Bishop and Wilks, and the plaintiffs, knowing this, drew a bill on all three partners for the price of the porter, and Bishop accepted the bill in the name of the three. It was held that Robson was not liable on this bill, there being no evidence to show that he knew anything of it. Lord Kenyon went so far as to say that the transaction was fraudulent on the face of it; but that is going rather far, as it is not uncommon for incoming partners to agree to take upon themselves the existing liabilities of the firm. When such an agreement is entered into, the incoming partner can hardly say he has been defrauded if a bill in the name of the new firm is accepted for a debt of the old firm without any specific authority on his part. But if the creditor cannot show an authority on the part of the incoming partner for the acceptance of a bill in his name for a debt of the old firm, the principle acted on in Shirreff *v.* Wilks will apply, for that case is clear law and has often been followed as such. (*x*) [54]

Liability of retired partners after notice.—The doctrine that a person who deals with a partner, knowing that he is exceeding his authority, cannot impute the acts of that partner to the firm, is further illustrated by the decisions establishing the non-liability of a retired partner for acts done by his copartners after notice of his retirement. These decisions will be examined at length hereafter.

(*u*) 1 East 48.

(*x*) See *ante* p. *171, and Ex parte Goulding, 2 Glyn & J. 118; Wilson *v.* Lewis, 2 Man. & G. 197, and 9 Dowl. Pr. Cas. 18, *sub nomine* Wilson *v.* Bailey.

54. Fraud on incoming partners.—Where one partner induces a stranger to purchase the interest of his copartners, by fraudulent representations, the selling partners are not liable for the fraud unless they instigate or approve the false statements, or the partner making them is acting as their agent in so doing. The mere fact of their relation as partners will not make them liable. Schwabacker *v.* Riddle, 84 Ill. 517.

One partner cannot charge a copartner by borrowing money in the name of the firm to pay debts incurred before the copartner came into the firm, and which he has in no way assumed or made himself liable for. Elkin *v.* Green, 13 Bush (Ky.) 619

Notice of private stipulations of partners.—Granting that a person knowing the limits of a partner's authority, as set by his copartners, cannot hold them responsible for an act done by him in excess of his authority, it still remains to determine the effect of notice by non-partners of stipulations entered into between the partners themselves.

*174] *In Galway *v.* Mathew (*y*) Lord Ellenborough is reported to have said: "It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the other. *They may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation.*"

Again, in Alderson *v.* Pope, (*z*) the same judge held "that where there was a stipulation between A, B and C, who appeared to the world as copartners, that C should not participate in profit and loss and should not be liable as a partner, C was not liable, as such, to those who had notice of this stipulation."

Principle examined.—These *dicta* appear to authorize the statement that if partners stipulate amongst themselves that certain things shall not be done, no person who is aware of the stipulation is entitled to hold the firm liable for what may be done by one of the members contrary to such stipulation. But it is submitted that this proposition is too wide. A stranger dealing with a partner is entitled to hold the firm liable for whatever that partner may do on its behalf within certain limits. To deprive the stranger of this right he ought to have distinct notice that the firm will not be answerable for the acts of one member, even within these limits. (*a*) Now, notice of an agreement between the members that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be answerable for them if he does. For there is nothing inconsistent in an agreement between the members of a firm that certain things shall not be done by one of them, and a readiness on the part of all the members to be

(*y*) 10 East 264.

(*z*) 1 Camp. 404.

(*a*) See, as to the sufficiency of such notices, Vice *v.* Fleming, 1 You. & J. 227.

responsible to strangers for the acts of each other as if no such an agreement had been entered into. It is immaterial to a stranger what stipulations partners may make amongst themselves, so long as they do not seek to restrict their responsibility as to him, and it is only when knowledge of an agreement between partners necessarily involves knowledge that they decline to be responsible for the acts of each other within the *ordinary limits that a stranger's rights against a firm can be prejudiced by what [*175 he may know of the private stipulations between its members.

In Galway *v.* Mathew (*b*) the plaintiff's knowledge of want of authority was derived, not from notice of any agreement between the partners, but from an advertisement published by one of them, warning all persons that he would no longer be liable for drafts drawn by the others on the partnership account. (*c*) The passage, therefore, in the judgment extracted above, was by no means necessary for the decision of the case. With respect to Alderson *v.* Pope, (*d*) if all that was meant was that a person knowing that C did not authorize A or B to act on his behalf could not hold C liable for their acts, the case presents no difficulty; but, if anything more than this was meant, the authority of the decision becomes at least doubtful; for it has been held in another case that a person who holds himself out as a partner with others with whom he has no concern is liable for their acts, even to persons having notice of the true state of affairs; and the decision was based upon the very ground that a person who holds himself out as a partner with others expresses his readiness to incur the responsibilities of a partner as regards strangers, whatever he may intend shall be the case between him and those with whom he associates his name. (*e*)

Private stipulations restrictive of liability.—Against the general proposition in question it may be further urged that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him. Such an agreement, coupled with notice of it on the part of a

(*b*) 1 Camp. 403, and 10 East 264, and *ante* p. *170.

(*c*) Distinct notice to the same effect existed in Minnit *v.* Whitney, 16 Vin. Ab. 244, and 5 Bro. P. C. 489; Willis *v.* Dyson, 1 Stark. 164.

(*d*) 1 Camp. 404.

(*e*) Brown *v.* Leonard, 2 Chitty 120.

person dealing with the firm, is by no means equivalent to a contract between him and it that he shall not hold the members responsible beyond the amount which they may have agreed between themselves to contribute respectively. (*f*)

*176] **Contracts on the basis of such stipulations.*—The writer is not acquainted with any case in which it has been *decided* that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves. In all cases of this description the real question to be determined seems to be whether there was distinct notice that the firm would not be answerable to strangers for acts which, without such notice, would clearly impose liability upon it, and whenever there is any doubt upon this point the firm ought clearly to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it. (*g*) [55]

(*f*) See Greenwood's Case, 3 De G., M. & G. 476.

(*g*) See Hawken *v.* Bourne, 8 Mees. & W. 703, where the defendant was held liable for goods supplied to a mine, though the prospectus of the mining company stated that all goods were to be bought for cash prices, and no debt was to be incurred.

55. **Private stipulations and notice of them.**—Partners are liable for all debts contracted by either of the partners, in respect to their business, notwithstanding an agreement between them that they should not be so bound. Sauffey *v.* Howard, 7 Dana (Ky.) 367.

Conditions in articles of partnership restricting the authority of the partners, that are not known to third parties, cannot affect them, and the nature of the copartnership is to be determined by what it assumes to the public to be, and by its mode of doing business. National Exchange Bank *v.* White, 30 Fed. Rep. 412. Therefore, evidence of such restrictions is irrelevant. Maltby *v.* Northwestern, &c., R. R. Co., 16 Md. 422; Cargill *v.* Corby, 15 Mo. 425; Perry *v.* Randolph, 14 Miss. 335; Nichols *v.* Cheairs, 4 Sneed (Tenn.) 229; Tillier *v.* Whitehead, 1 Dall. (U. S.) 269; Devin *v.* Harris, 3 Iowa 186; Barber *v.* Mann, 5 Bush (Ky.) 672; Lawrence *v.* Kinsting, 1 Mont. T. 290; Everett *v.* Chapman, 6 Conn. 347; Laler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 Id. 81; National Union Bank *v.* London, 66 Barb. (N. Y.) 189.

Thus, a client who employs an attorney, employs the firm of which he is a member, and is not chargeable with knowledge of a private understanding as to compensation existing between the members of the firm. If the client pays one member, he pays all. Williams *v.* More, 63 Cal. 50. So, also, where one partner endorses a bill payable to the firm, to an innocent purchaser for value, the firm is bound, notwithstanding they had agreed that no member should endorse paper to make the others liable. Barrett *v.* Russell, 45 Vt. 43.

SECTION V.—OF THE LIABILITY OF PARTNERS IN RESPECT OF CONTRACTS NOT ENTERED INTO ON BEHALF OF THE FIRM OR NOT SO IN PROPER FORM.

Observations on foregoing propositions.—The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent, whose acts are sought to be imputed to the firm, was acting in his character of agent, and not as a principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm, and he alone is liable for them, even though the firm may have benefited by them. Whether a contract is entered into by an agent as such, or by him as a principal, is often, but not always, apparent from the form of the contract.

With reference to the forms of contracts, it will be convenient to consider—

1. Contracts under seal.
2. Ordinary contracts not under seal.
3. Bills of exchange and promissory notes.

*1. *Contracts under seal.*—A distinction is taken between deeds and other instruments with respect to the person bound by them. If a deed is executed by an agent in his own name, he, and he only, can sue or be sued thereon, although the [*177

Mr. Watson, in his Treatise on Partnership (c. 4, p. 194, 2d ed.), says: "We have seen, in ——— *v.* Layfield (1 Salk. 292), Lord Holt held that the act of one partner should be presumed the act of the others, and should bind them, unless they could show a disclaimer. And it would seem that even during the subsistence of the partnership, and in the established course of trade, one partner may, to a certain degree, limit his responsibility. If there be any particular speculation or bargain proposed, which he disapproves of, by giving distinct notice to those with whom his copartners are about to contract that he will not in any manner be concerned in it, they could not have recourse upon him, as proof of this notice would rebut his *prima facie* liability. The partnership, in that case, might either be considered as dissolved, or, *quoad hoc*, as suspended." See, also, as to when notice of such stipulations will exclude the inference of authority in one partner to bind the others, McCrary *v.* Slaughter, 58 Ala. 230; Radcliffe *v.* Varner, 55 Ga. 427; Pollock *v.* Williams, 42 Miss. 88; Dreyer *v.* Sander, 48 Mo. 400.

deed may disclose the fact that he is acting for another. (*h*) Therefore, where a partner *covenants* that anything shall be done, he, and he only, is liable on the covenant, and the firm is not bound thereby to the covenantee. (*i*) A person who has to execute a deed as an agent should take care that the deed, and the covenants in it, are expressed to be made, not by him, but by the person intended to be bound. Thus, if A is the principal, and B his agent, the deed and covenants should not be expressed to be made by B for A, but by A; and the execution, in like manner, should be expressed to be made by A by his agent B. (*k*) 56

(*h*) Appleton *v.* Binks, 5 East 148; Pickering's Case, 6 Ch. 525; and see next note.

(*i*) Hancock *v.* Hodgson, 4 Bing. 269; Hall *v.* Bainbridge, 1 Man. & G. 42.

(*k*) Combe's Case, 9 Co. 76 *b*; Wilks *v.* Back, 2 East 141.

56. **Contracts under seal generally.**—This subject has been already discussed (*supra*, p. *136, note 20), but a few cases of interest remain to be examined. Where the signature of a firm name to an instrument shows that it was intended to be the act of all the partners, effect must be given to it accordingly, although only one of them is named in the body of the instrument. George *v.* Tate, 102 U. S. 564. S. P., Berk. Woolen Co. *v.* Julliard, 75 N. Y. 535.

Seal unnecessarily used.—The rule that one partner cannot bind another, or the firm, by a sealed instrument, is subject to the exception, as we have seen (*supra*, p. *138, note), that if the contract made by him would have been good without using the seal, the affixing a seal will not render it invalid. Tapley *v.* Butterfield, 1 Metc. (Ky.) 515; Purviance *v.* Sutherland, 2 Ohio St. 478; Human *v.* Cuniffe, 32 Mo. 316; McCullough *v.* Sommerville, 8 Leigh (Va.) 415.

Thus, where a writing under seal is executed by one partner in the name of the firm, such writing is admissible in an action of *assumpsit*, to prove a promise by the firm, if made on sufficient consideration. Fagely *v.* Bellas, 17 Pa. St. 67.

Bonds.—If one partner, for the benefit of the partnership, executes a bond, with surety, which the surety is compelled to pay, he does not thereby acquire a right of action against the other partners. Tom *v.* Goodrich, 2 Johns. (N. Y.) 213.

In an action by a surviving partner on an obligatory writing given to a firm, the plea was that the bond was not given to the firm, but to the deceased partner in the firm's name. At the trial the court instructed the jury that if they believed "from the testimony that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution, and the suit maintained by the surviving partner." *Held*, that this instruction was unexceptionable. Stillwell *v.* Gray, 17 Ark. 473.

Where one partner hired slaves in his individual name, but in fact for the use of the firm which had the benefit of their labor, and he gave his individual bond with surety for the hire, on which judgment was subsequently recovered, and

2. *Ordinary contracts not under seal.*—When a person enters into a contract as the agent of another, the name of that other may be either disclosed or not. If it is disclosed, the contract is treated

paid by the surety, who then filed his bill against his principal and his copartners, on which it appeared that the principal in the bond was a non-resident of the state, and insolvent, it was held that the surety was entitled to a decree against his copartners for the amount paid by him. Weaver *v.* Tapscott, 9 Leigh (Va.) 424.

Where money was lent to a firm, and the partner who conducted the transaction, by mistake, executed a penal bond for the sum, in the name of the firm, instead of giving a promissory note therefor—*Held*, that though at law the creditor had no remedy on the bond, except against the partner who executed it, yet equity would correct the mistake, and hold all the partners bound for the debt. Galt *v.* Calland, 7 Leigh (Va.) 594.

Leases.—Two partners took an assignment of a lease of certain rooms, and afterwards one of them, A, by an agreement under seal, without the knowledge of the other, sublet a part of the room and granted other privileges to the plaintiff for a term of three months beyond the termination of the lease. Subsequently the other partner sold his interest to B. A and B received rent from the plaintiff. At the termination of the first lease, the plaintiff was dispossessed, and brought an action of *assumpsit* against A and B for the damage he had sustained. *Held*, that the agreement under seal was not evidence in the action; that from the receipt of rent by A and B no contract could be implied against B, the incoming partner; and that none such was to be implied from the partnership. Bewley *v.* Tams, 17 Pa. St. 485.

Mortgages.—The execution of a mortgage of personal property of a partnership by one partner in his individual name passes no title. Clark *v.* Houghton, 12 Gray (Mass.) 38.

A sealed mortgage executed by one partner not in the firm name, after dissolution by the withdrawal of a partner and the appointment of a receiver, creates no lien on the firm property. Husted *v.* Ingraham, 75 N. Y. 251.

Where a partner buys real estate in his own name, and gives his individual bond and mortgage in part payment therefor, the firm is not liable to the seller for the unpaid purchase money, though it appear by the firm books that the land was bought on firm account, and a declaration of trust was afterwards executed by the purchaser, but not recorded, declaring that the money paid was partnership funds, and that the land was held by him in trust as partnership property. North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181.

Releases.—The law firm of T. & A. rendered services for S., and A. charged them on the books of the firm. T. made a several claim for the same services, after the death of S., against his estate, which was allowed and paid, T. executing a release under seal in the name of T. & A. *Held*, that the release was binding on the firm, as no collusion between T. and the administrator of S. was shown, although the release was made long after the dissolution of the firm of T. & A., and T. was in embarrassed circumstances, and had no attachable property. Thrall *v.* Seward, 37 Vt. 573.

Sealed bills and notes.—Where the

as that of the principal, and not as that of the agent; (*l*) whilst if it is not disclosed, the contract is considered as that of the agent. But in this last case the person dealing with the agent can, when he discovers the undisclosed principal, hold him liable instead of the agent. (*m*)

*178] **Firm liable though not named. Written contracts.*—If, therefore, one partner only enters into a written contract, the question whether the contract is confined to him or whether it extends to him and his copartners, cannot be determined simply by the terms of the contract. For, supposing a contract to be entered into by one partner in his own name only, still, if in fact he was acting as the agent of the firm, his copartners will be in the position of undisclosed principals, and they may therefore be liable to

instrument upon which the action is brought against a partnership is of such a character as to require that it shall be executed under seal, *e. g.*, a single bill, the signing of the partnership name with a seal attached by one partner will not bind his copartner, without proof of previous authority or subsequent ratification. There is no *legal* presumption that the execution of a note under seal by one copartner, even though he may have the entire management of the business, is the act of the partnership; the rule is rather the other way. The non-liability of one member of a firm on single bills executed without authority in the firm's name by his copartner is not affected by his subsequent acknowledgment of his liability on the open account to secure which the bills were given. Sibley *v.* Young (S. C.), 2 S. E. Rep. 314. See, also, Fant *v.* West, 10 Rich. (S. C.) 149; Harris *v.* Miller, 1 Meigs (Tenn.) 158.

So, if one partner borrows money on his own credit, and gives his sealed note for the amount, the firm is not liable, though the money be used in the partnership transactions. Willis *v.* Hill, 2 Dev. & B. (N. C.) L. 231. But such a note may be given in evidence in an action of *assumpsit* against the firm, founded on the contract out of which the note arose (Walsh *v.* Lennon, 98 Ill. 27; S. C., 38 Am. Rep. 75; Doniphan *v.* Gill, 1 B. Mon. (Ky.) 199); but not, it seems, to establish an "account stated" in a suit brought against the partner who did not sign it. Heath *v.* Gregory, 1 Jones (N. C.) L. 417.

(*l*) Fairlie *v.* Fenton, L. R., 5 Ex. 169; Ex parte Hartop, 12 Ves. 352; Russell *v.* Reece, 2 Car. & K. 669. But even in this case the contract may be so worded as to bind the agent. See Paice *v.* Walker, L. R., 5 Ex. 173; Calder *v.* Dobell, L. R., 6 C. P. 486.

(*m*) See Paterson *v.* Gandasequi, 15 East 62; Thompson *v.* Davenport, 9 Barn. & C. 78; and the note to those cases in 2 Sm. Lead. Cas. If a man contracts for "my principal;" the principal, although undisclosed, and not the agent, is liable; unless there is some special custom rendering the agent personally liable. But if there be such a custom the agent will be liable. See Fleet *v.* Murton, L. R., 7 Q. B. 126.

be sued on the contract, although no allusion is made to them in it. This was expressly decided in the well-known case of Beckham *v.* Drake. (*n*) There, Drake, Knight and Sturgey were in partnership as type-founders, but Drake was a secret partner. A written agreement relative to the partnership business was entered into between the plaintiff and Knight and Sturgey, and for a breach of this agreement by them the action was brought. Drake's name did not appear in the agreement; he did not sign it; nor, when the contract was made, was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and Drake, like any other undiscovered principal, was liable to be sued as soon as his position was discovered.

Parol contracts.—In conformity with the same principle, if one partner, acting in fact for the firm, orders goods and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his copartners, (*o*) and they are unknown to the seller of the goods. (*p*) So, if A, in his own name only, underwrites a policy of insurance, but the profit or loss arising from the transaction is to be divided between him and B, both A and B will be liable to the insured. (*q*) [57]

(*n*) 9 Mees. & W. 79, and 11 Mees. & W. 315, overruling Beckham *v.* Knight, 4 Bing. N. C. 243.

(*o*) City of Lond. Gas Light and Coke Co. *v.* Nicholls, 2 Car. & P. 365; Whitwell *v.* Perrin, 3 C. B. (N. S.) 412.

(*p*) Ruppell *v.* Roberts, 4 Nev. & M. 31; Robinson *v.* Wilkinson, 3 Price 538; Bottomley *v.* Nuttall, 5 C. B. (N. S.) 122.

(*q*) Brett *v.* Beckwith, 3 Jur. (N. S.) 31, M. R.

57. **Ordinary simple contracts—firm liable though not named.**—The following cases fully bear out the text: Everett *v.* Chapman, 6 Conn. 347; Bisel *v.* Hobbs, 6 Blackf. (Ind.) 479; Roth *v.* Moore, 19 La. Ann. 86; Baring *v.* Crafts, 9 Metc. (Mass.) 380; Norton *v.* Thatcher, 8 Neb. 186; Brown *v.* Fitch, 4 Vr. (N. J.) 418; Tucker *v.* Peaslee, 36 N. H. 167; Reynolds *v.* Cleveland, 4 Cow. (N. Y.) 282; Baxter *v.* Clark, 4 Ired. (N. C.) L. 127; Poole *v.* Lewis, 75 N. C. 417; Given *v.* Albert, 5 Watts & S. (Pa.) 333; Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165; Burnley *v.* Rice, 18 Tex. 481; Griffith *v.* Buffum, 22 Vt. 181; Hills *v.* Bailey, 27 Vt. 548.

And the converse proposition is equally true, *i. e.*, the firm may enforce a contract made for its benefit with only one of its members in his individual name. Illinois, &c., R. R. Co. *v.* Owens, 53 Ill. 391; Havana, &c., R. R. Co. *v.* Walsh, 85 Ill. 58; Snell *v.* Atlantic, &c., Co., 18 Am. L. Reg. (N. S.) 79.

Liability of dormant partners.—These cases establish the important proposition that dormant partners are liable for the debts of the firm, notwith*standing their connection with the firm was unknown to its creditors when the debts were [*179 contracted. 58

One partner only liable, he only being dealt with.—On the other hand, if one partner only is dealt with, and the circumstances are such as to show that he was acting and was dealt with on his own account, *i. e.*, as a principal, and not as the agent of the firm, he alone is responsible. (*r*)

Thus, where persons work a coach in partnership, each having his own horses, and one of them orders fodder on his own account, he alone is liable for it. (*s*) So, in the ordinary case of an agreement between an author and a publisher, to the effect that the publisher shall pay for the paper, printing and other expenses of publication, and that after reimbursing himself and deducting a commission, the profits shall be divided equally, the author is not liable for the

Thus, in an action brought by a tannery firm for false warranty of a mule bought by one member thereof, without mention that it was for the firm, it was held that the burden of proof was on the defendant to sustain his motion for a nonsuit, although there was no showing that the mule had ever been used in the tannery. Little *v.* Hamilton, Phil. (N. C.) L. 29.

A orders goods of B by letter; the copartnership of which B was a member forwarded the goods to A, without a bill or letter, who received them, supposing them to have been forwarded by B individually. *Held*, that the copartnership might maintain an action, for goods sold and delivered, against A. Child *v.* Wofford, 3 Ala. 564.

58. Liability of dormant partner.—A partnership for the manufacture of iron was composed of four persons, the names of two of whom did not appear, and these lived at a distance. The two acting partners bought land in their own name for the purpose of obtaining from it wood to be used in the manufacture of iron, and so far as it was paid for, it was paid for out of the partnership effects. The land is partnership property, and the partnership having failed, the two dormant partners are liable to the vendor for the balance of the purchase money. Brooke *v.* Washington, 8 Gratt. (Va.) 248.

See, however, *contra*, as to the liability of dormant partners in land, Gray *v.* Palmer, 9 Cal. 616.

(*r*) See, in addition to the cases cited below, Ex parte Eyre, 1 Ph. 227.

(*s*) Barton *v.* Hanson, 2 Taunt. 49. Mr. Collyer treats this as an exception depending on particular custom, but this view is not correct. The law is the same in Scotland; see Jardine *v.* M'Farlane, 3 Ross Lead. Cas. on Com. Law 575.

paper or printing which may have been supplied and executed for the publisher. (*t*) [59]

Form of written contracts.—With respect to contracts in writing it is to be observed that a contract or other instrument required by statute to be in writing and signed by the party to be charged, only binds those partners who actually sign it; (*u*) but if signature by the party to be charged, or his agent, is sufficient, the signature of

(*t*) See the Scotch case of Venables *v.* Wood, 3 Ross Lead. Cas. on Com. Law 529; Wilson *v.* Whitehead, 10 Mees. & W. 503; but, see Gardiner *v.* Childs, 8 Car. & P. 345, where the paper was supplied for the specific book.

59. **One partner only liable, he only being dealt with.**—Although a partnership exists, yet one of the partners may contract and bind himself in his individual capacity, and the partnership cannot be charged with it. McDonald *v.* Parker, Sneed (Ky.) 245. When no credit is given and there is no expectation, originally, of looking to one partner for debts incurred by the other, no recovery against the former can be had. Chapman *v.* Devereux, 32 Vt. 616; Floyd *v.* Wallace, 31 Ga. 668. And the mere fact that money loaned to one partner on his individual contract is applied to the payment of partnership debts does not constitute the lender a creditor of the firm. National Bank *v.* Thomas, 47 N. Y. 15. It must further appear that the money was so used with the knowledge and approbation of the firm, or that the debt was subsequently assumed by the firm. Nichols *v.* English, 3 Brewst. (Pa.) 260; Smith *v.* Hoffman, 2 Cranch (U. S.) C. C. 651. But see Snead *v.* Barringer, 1 Stew. (Ala.) 134.

Defendant's being a partner in a firm charged in book account is not, of itself, conclusive of his liability in an action thereon, for it may be shown by parol on whose account the articles charged were delivered, and the parties were competent witnesses for themselves or each other to that point. Burton *v.* Ferris, Brayt. (Vt.) 78.

Where one copartner makes a sale or disposition of the partnership property in his own name, and without disclosing the name of his copartner or copartners having an interest therein, at the same time warranting the soundness thereof, also in his own name, suit may be maintained against him for a breach of this warranty without joining his copartner in the action. Cookingham *v.* Lasher, 38 Barb. (N. Y.) 656; Clark *v.* Holmes, 3 Johns. (N. Y.) 148.

The plaintiff was employed by the defendant on his credit alone, to open and develop a coal mine on lands owned by the defendant, with others. It not appearing that the other proprietors requested the defendant to engage in this enterprise, or authorized him to employ the plaintiff to perform this service, it was held that the mere fact that they were cotenants with the defendant in the land was not enough to warrant the presumption that they were partners with him in his scheme to develop a coal mine upon it. Stannard *v.* Smith, 40 Vt. 513.

(*u*) Swift *v.* Jewsbury, L. R., 9 Q. B. 301, reversing Swift *v.* Winterbotham, 8 Q. B. 244.

one partner in the name or on behalf of the firm will bind all the partners. (*v*)

It is often a matter of difficulty to determine whether a particular contract is entered into by the firm through one of the partners or by that one partner only. There is nothing to prevent one person from entering into a contract *as a principal*, and yet for and on behalf of another, (*x*) and when A enters *into a contract for B, it may not be easy to say whether it is B who contracts or whether it is A for B's benefit. And yet the true answer to this question determines whether B is or is not liable on the contract. The cases on this subject relate principally to bills of exchange and promissory notes, to which it is now proposed to pass. 60

*180]

3. *Bills of exchange and promissory notes.*—Although an ordinary contract not under seal, entered into by an agent for an undisclosed principal, is binding on that principal when discovered, and he can be sued upon it, the same rule does not apply to bills of exchange and promissory notes. For, subject to the qualification that the name of a firm is equivalent to the name of all the persons liable as partners in it, (*y*) no person whose name is not on a bill or note is liable to be sued upon it. (*z*) In order, therefore, that a bill or note may be binding on a firm, the name of the firm, or the names of all its members, must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given. (*a*)

(*v*) See Duncan *v.* Lowndes, 3 Camp. 478. In Ex parte Harding, 12 Ch. D. 557, a letter of guarantee was so framed as to bind the firm and also those who signed it separately.

(*x*) See, in addition to the cases cited hereafter, Gadd *v.* Houghton, 1 Ex. D. 357; Hough *v.* Manzanos, 4 Ex. D. 104; Southwell *v.* Bowditch, 1 C. P. D. 374; Paice *v.* Walker, L. R., 5 Ex. 173. See, also, Kay *v.* Johnson, 2 Hem. & M. 118, where an agreement for a lease entered into by directors was enforced against them individually.

60. Execution of contract.—A contract drawn by one partner, and signed by the other in the partnership name, is the agreement of both as partners. Witter *v.* M'Neil, 3 Scam. (Ill.) 433. See, also, Marvin *v.* Buchanan, 62 Barb. (N. Y.) 468.

(*y*) 45 and 46 Vict., c. 61, § 23 (2); and *infra*, note (*b*), *et seq.*

(*z*) Id., § 23; and Lloyd *v.* Ashby, 2 Car. & P. 138; Ducarry *v.* Gill, 4 Id. 121; Eastwood *v.* Bain, 3 Hurlst. & N. 738.

(*a*) Bottomley *v.* Nuttall, 5 C. B. (N.

a. *Bills in name of firm.*—First, as regards bills having the name of the firm upon them. A bill drawn, endorsed or accepted in the name of the firm is considered as bearing the names of *all* the persons who actually or ostensibly compose the firm at the time its name is put to the bill; and, consequently, all those persons, including as well dormant as *quasi* partners, may be sued upon the bill. (*b*) [*181

Thus, where A employed B to carry on his business, and such business was carried on by B for A under the name of B & Co., a bill accepted by B in the name of B & Co., for the purposes of the business, was held to be the acceptance of A; although B had positive instructions not to accept bills, and the holder of the bill, who was an endorsee for value, knew nothing of A or B or of the business. (*c*)

Moreover, if two partners, A and B, carry on business in the name of A, a bill accepted by B in the name of A, for the purposes of the partnership, will bind both partners, although addressed to A at a place where he carries on a separate business. (*d*) [61]

Two firms with one name.—If there are two firms with one name, a person who is member of both firms is liable to be sued on all

S.) 122; Miles' Claim, 9 Ch. 635. As to the difference between an acceptance in the form A for B, and B *per proc.* A, see O'Reilly *v.* Richardson, 17 Ir. Com. Law Rep. 74. Bills may be made payable to the holder of an office for the time being. 45 and 46 Vict., c. 61, § 7 (2).

(*b*) 45 and 46 Vict., c. 61, § 23 (2). See, as to dormant partners, Swan *v.* Steele, 7 East 210; Wintle *v.* Crowther, 1 Cromp. & J. 316; and, as to *quasi* partners, Gurney *v.* Evans, 3 Hurlst. & N. 122. A clerk who affixes the name of the firm is not liable on the bill. Wilson *v.* Barthrop, 2 Mees. & W. 863.

(*c*) Edmunds *v.* Bushell, L. R., 1 Q. B. 97.

(*d*) Stephens *v.* Reynolds, 5 Hurlst. & N. 513, and at *Nisi Prius*, 1 Fost. & F. 739, and 2 Id. 147. N. B.—The bill was drawn on Reynolds at Woolwich, not at Walworth, as stated in 1 Fost. & F. 740.

61. Bills in name of firm.—Where two firms in different localities enter into an agreement, in express terms, creating a partnership for the purpose of carrying on the legitimate freighting business, and, adopting no partnership name, carry on the business in each locality under the name of the firm there established, a bill of exchange, drawn by one firm upon the other, the proceeds of which are applied to the partnership business, will bind the firm against which it is drawn, not only in an action for money lent, but also as a party to the bill. Wright *v.* Hooker, 10 N. Y. 51.

bills bearing that name, and binding on either firm. But if a member of only one of the two firms is sued on the bill, his liability will depend, first, on the authority of the person giving the bill to use the name of the firm of which the defendant is a member; and, secondly, on whether the name of that firm has in fact been used. If both these questions are answered in the affirmative, he will be liable, but not otherwise.

Thus, in Swan *v.* Steele, (*e*) there were two firms of Wood & Payne, one a cotton firm, the other a grocer's firm. The defendant, Steele, was a partner in the cotton firm only. A bill was paid to the cotton firm for a debt due to it, and was made payable to its order. This bill was endorsed in the name of "Wood & Payne," by Steele's copartners, for a debt owing to the plaintiff by the grocer's firm, to which Steele did not belong. Steele was never-
*182] theless held liable on this bill, *the plaintiff being a *bona fide* holder for value, without notice that any fraud on Steele was being committed. In this case the bill was properly endorsed "Wood & Payne," and the only question was who constituted that firm. The bill could only have been endorsed by the cotton firm. Steele was a member of it, though he was not a member of the firm for whose debt his partners paid it away. Lord Ellenborough held Steele's liability to be too clear for argument; for Steele was a member of the endorsing firm, and his copartners in that firm were guilty of a fraud on him, of which the plaintiffs had no notice. 62

(*e*) 7 East 210.

62. Two firms with one name or common partner.—A party can only be bound on a note executed in a firm name, who is actually a member of the firm executing the same, or who has held himself out as a member, so as to give the firm credit on his responsibility. Sargent *v.* Collins, 3 Nev. 260. S. P., Cushing *v.* Smith, 43 Tex. 261; Cobb *v.* Illinois Central R. R. Co., 38 Iowa 601. Where the plaintiff delivered property to W. Downer and H. Dana, and executed to them, by the name of Downer & Dana, a bill of sale of the property, in which he acknowledged receipt of payment by note, and the note which he received was, by Dana, signed "Downer & Dana," and it appeared in evidence that there was in existence at that time, doing business, such a firm as "Downer & Dana," consisting of those two individuals, it was held that the plaintiff could not recover on the note against another firm of different style, consisting of the same Downer and Dana and a third person, notwithstanding it might appear that the latter firm was also then

Name of firm same as that of individual.—Again, persons may carry on business in partnership in the name of one of themselves, and, if they do, they expose themselves to serious liability. *Prima facie* his acceptances will bind them, even although dishonestly given. (*f*) At the same time, if they can show that he gave the bills as his own, and not as the bills of the firm, they will not be liable, even to a *bona fide* holder for value. This was decided by the Court of Appeal in The Yorkshire Banking Company *v.* Beatson, (*g*) in which the law on this subject will be found exhaustively examined. In that case an accommodation acceptance given by one partner in his own name was held not binding on his dormant partner, as the acceptance was not intended to bind him, and was, in truth, a private transaction, and was not entered in the books of the firm. The fact that the plaintiffs took the bill as the bill of the persons, whoever they were, who might be associated with the partner whose name was on the bill, was held immaterial. The plaintiffs never knew of, or gave credit to any one else.

If A, B & C are partners, and A draws a bill of exchange on B, and he accepts the bill, A, B & C cannot be sued upon it; and this is so whether A, B & C have a business name or not; (*h*) and even although the bill may have been used for the joint benefit of the three partners. (*i*) Even if it is agreed that the business of the three shall be carried on in the name *of one of them, it will not follow that all bills accepted by him will bind all the three partners. The question remains, Whose bill is it? [*183

This was decided by the Court of Appeal in Chancery, in Miles' Claim. (*j*) There four firms, F. & Co., M. & Co., M. & L., and

doing business at the same place, there being no testimony tending even to prove that the latter firm had, at any time, done any act which could have induced the plaintiff to believe that Downer and Dana had ever been authorized to use their own name and style for the purposes of the other firm; and that upon this testimony it was improperly left to the jury to find whether the note was executed, and received by the plaintiff as the note of the latter firm. Miner *v.* Downer, 19 Vt. 14.

(*f*) See 5 C. P. D. 123 and 124.

(*g*) 5 C. P. D. 109, affirming S. C., 4 Id. 204, but on different grounds. N. B.—The court set aside the verdict of the jury. See, also, South Carolina Bank *v.* Case, 8 Barn. & C. 427; Ex parte Law, 3 Deac. 541.

(*h*) See Nicholson *v.* Ricketts, 2 El. & E. 497, and Miles' Claim, 9 Ch. 635.

(*i*) Ib.

(*j*) 9 Ch. 635.

A. & Co., engaged in a joint adventure, and agreed to carry on business under the name of F. & Co., and to divide profits and losses in equal shares. They also agreed that funds for the adventure should be raised by the drafts of any one of the four firms on the others. Bills were drawn by M. & Co. on A. & Co., on M. & L. and on F. & Co., and were duly accepted. It was held that none of these bills bound all four firms jointly. As regards the bills drawn on A. & Co. and on M. & L., the case presented no difficulty, for it is plain that these bills were not drawn or accepted in the name in which the joint adventure was carried on. As regards the bills accepted by F. & Co., which was the name under which the joint adventure was carried on, there was an ambiguity; but the court held that this name, used as it was, really meant the separate firm F. & Co., and not the four firms engaged in the adventure, and that there was no sufficient reason for holding it to mean anything else.

Again, in Hall *v.* West, (*k*) three brothers of the name of Dawson carried on in partnership, under the name of Dawson & Sons, the business of millers, farmers, coal and corn dealers and bone crushers. The defendant was a dormant partner in the bone crushing business only. Dawson & Sons overdrew their account with their bankers, who knew nothing of West nor of his connection with the bone business. Having, however, discovered this, they sued him for the amount of the overdrawn account. He was held not liable, for in point of fact the balance due to the bankers was not in respect of any debt contracted by Dawson & Sons in connection with the bone crushing business; it was not, therefore, as between the partners themselves, a debt of the firm of which the *184] defendant *was a member, and there was no apparent as distinguished from real authority, on which the bankers could rely as against West.

In the same case, bills were drawn by West on and accepted by Dawson & Sons. With one exception, these bills were drawn for purposes unconnected with the bone business. On the facts stated

(*k*) A special case decided in the Exchequer, and afterwards in the Exchequer Chamber, in June, 1875. The above note of the case is taken from shorthand writer's notes of the judgments.

(but which it is unnecessary here to detail) the court held that all these bills had in fact been paid; it became unnecessary, therefore, to consider whether West could have been sued as an acceptor. It was contended, on the authority of Baker *v.* Charlton, (*l*) that he was liable; but the Court of Exchequer (*m*) dissented from that case and expressed a clear opinion that West could not have been liable as an acceptor of the bills, with the exception of the one which had been given for the purposes of the bone business in which he was a partner. The Court of Exchequer Chamber expressed no opinion on this point, it being unnecessary to do so. 63

(*l*) In Baker *v.* Charlton, Peake (3d ed.) 111, two firms carried on business under the name of J. King & Co. The defendant was partner in one of them only, but his copartners were members of both firms; the defendant was sued by an endorsee on a bill drawn by his copartners in the name of "J. King & Co.;" the defendant resisted the action on the ground that the bill was not drawn by the firm to which he belonged, but by the other; but Lord Kenyon declared the defence invalid. Having traded with persons under the style of "J. King & Co.," the defendant was liable on bills drawn by them in that name. See, also, Davidson *v.* Robertson, 3 Dow 218; McNair *v.* Fleming, 1 Mont. Part. 37, and 3 Dow 229. But Baker *v.* Charlton cannot now be relied on.

(*m*) *I. e.* Kelly, C. B., and Amphlett, B.

63. **Name of firm same as that of individual.**—Where a partnership is carried on in the name of an individual, and a suit is brought against the partners on a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners. The plaintiff, to recover against the partners, must not only prove the execution of the note, but go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership, or that, when obtained, it was used in the business of the partnership. Oliphant *v.* Mathews, 16 Barb. (N. Y.) 608. S. P., Mercantile Bank *v.* Cox, 38 Me. 500; Chemung Bank *v.* Ingraham, 58 Barb. (N. Y.) 290. Especially does this presumption arise when the signer of the paper openly transacts business on his own account. Manufacturers', &c., Bank *v.* Winship, 5 Pick. (Mass.) 11.

In United States Bank *v.* Binney (5 Mason (U. S.) 176, 183, 184), the court say: "In respect to both general and limited partnerships, the same general principle applies that each partner has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will, *prima facie*, bind the firm, unless it is *ultra* the business of the firm. Where the firm imports, on its face, a company, as A, B & Co., or A, B & C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only

b. *Bills not in name of firm.*—Secondly, as regards bills not drawn, accepted or endorsed by the firm in proper form. In the absence of evidence to the contrary, a partner has no authority to

to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs must go further, and show that it is a partnership signature. In the present case the signature of 'John Winship' may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish that it is a contract of the firm, and ought to bind them. * * * The notes are all endorsed in the name of 'John Winship.' For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go further, and show, either expressly or by implication, that these notes were offered by Winship as notes binding the firm, and not merely on himself personally; or that the discounts were made for the benefit and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove that the bank, in discounting these notes, acted upon the belief that they bound the firm, and were for the benefit and business of the firm. They must go further and prove that the belief was known to and sanctioned by Winship himself in offering the notes; and that he intentionally held out to them that the discounts were for the credit and on the account of the firm; and that his endorsement was the endorsement of the firm, and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge from the whole evidence how the case stands in these respects. The mere fact that the discounts so procured were applied to the use of the firm is not, of itself, sufficient to prove that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight, but not decisive."

Again, in Etheridge *v.* Binney (9 Pick. (Mass.) 272, 274), the court say: "Now, as the partner, whose name is assumed by the firm, may also engage in other branches of business, in which he may want credit on his own private account, if he applies for a loan of money to one who is ignorant of the copartnership, and no information is given of its existence, it is a private loan, and does not bind the firm, unless the creditor shall know that the money borrowed, or the goods procured, by the individual, went to the use of the firm. The burden of proof in such case is upon the creditor, in order to make good his claim upon the firm, for he credited the individual, and not the firm, and it will be presumed to be for the private benefit of the individual, unless the contrary is proved. But if the existence of the firm is known to the person who makes the loan, and representations are made to him by the borrower that he borrows for the use of the company, and that they are answerable for the debt, so that credit is given to the company, and not to the individual partner, the burden of proof is upon the company, when sued, to show that the power confided to the

use for partnership purposes any other name than the name of the firm; (*n*) and if he does, and there is any substantial variation which cannot be shown to be authorized by his copartners, the firm will not be liable. If, however, there is no substantial variation, the firm will be bound.

In Faith *v.* Richmond (*o*) persons carrying on business in *partnership under the name of The Newcastle and Sunderland Wallsend Coal Company were held not liable on a [*185 note issued in the name of The Newcastle Coal Company; and in Kirk *v.* Blurton, (*p*) where two persons carried on business under the name of John Blurton, one of them was held not liable on a

individual has been abused, and that the money borrowed was applied to his private use, and also that this was known to the lender to be his intention. This principle necessarily follows from cases settled. If a purchase is made in the name of a firm, or money borrowed, and a note given or endorsed in that name, this is *prima facie* evidence of a debt from the firm, and it can only be rebutted by proof, in the defence, that this was fraudulently done by the individual partner for his own private use, and that this was known to the creditor. So that in the limited partnership, if the name of the firm had been John Winship & Co., or Winship & Binney, all notes given to any creditor, in either of those names, would be company notes, unless disproved, as before stated. Now the making and offering of such a note is nothing more than a representation that the money is wanted for the use of the company, and as they confide in the individual, they will be bound by his acts. The name of the firm here being only the name of the individual, a note offered in that name, unaccompanied by any representation, would of course import only a promise by John Winship alone; and the credit being given to him alone, the creditor would not recover against the firm, without proving that the money actually went into the funds of the firm. But if the borrowing partner states that he is one of a company, and that he borrows money for the company, or purchases goods for their use, then, as there is such company, and as they have given him authority to use the company credit to a certain extent, and as the creditor will have no means of knowing whether he is acting honestly towards his associates, or otherwise, if he lends the money or sells the goods on the faith of such representation, the company will be bound, unless they prove that the contract was for his private benefit, and known to be so by the creditor."

(*n*) Kirk *v.* Blurton, 9 Mees. & W. 284; Hambro' *v.* Hull and London Fire Insurance Co., 3 Hurlst. & N. 789.

(*o*) 11 Ad. & E. 339.

(*p*) 9 Mees. & W. 284. This case was decided on the right principle, but most persons will probably agree with Martin, B., in thinking that the principle was not properly applied, and that it should have been left to the jury to say whether John Blurton and John Blurton & Co. did not in fact mean the same thing. See per Martin, B., 5 Hurlst. & N. 517.

bill drawn and endorsed by the other in the name of John Blurton & Co.

On the other hand, in Norton *v.* Seymour, (*q*) where the name of the firm was Seymour & Ayres, a promissory note signed by one of the partners, thus: "Thomas Seymour & Sarah Ayres," was held to bind both. 64

Effect of frequent use of wrong name.—In the above cases of Faith *v.* Richmond and Kirk *v.* Blurton, the name used was not the name of the firm sought to be made liable, nor was there any evidence to show that the firm was in the habit of making use of the name in question. If there had been such evidence the firm would have

(*q*) 3 C. B. 792.

64. Bills not in firm name.—Ordinarily, where the partners of a firm have a copartnership name which they constantly use, they will not be bound by the use of a new name, unless it be shown that all the partners have assented to the use of such new name, or that the partner who was intrusted with the control and management of the business of the firm had so assented. Palmer *v.* Stephens, 1 Den. (N. Y.) 471. But if a partner, acting under the authority of the firm, given by parol, to take up money on joint account, and draw therefor on A, does draw a bill of exchange in his own name, but directs the amount to be charged to account of the firm, and the parties, knowing the facts, receive the cargo, purchased with the funds so raised, without objection, the payee may recover of the partners as on a partnership draft, or a draft guaranteed to the holder by them. Reimsdyk *v.* Kane, 1 Gall. (U. S.) 630. Thus, it has been held that a draft drawn by one only of three partners, but on their joint credit, and for their joint benefit, may be recovered as an item in an account against the firm. Beebe *v.* Rogers, 3 Iowa 319; Beach *v.* State Bank, 2 Ind. 488. *Contra*, Heenan *v.* Nash, 8 Minn. 407; Cunningham *v.* Smithson, 12 Leigh (Va.) 32.

The proprietors of a line of canal boats, by articles between themselves, agreed that the business of the concern at Rochester should be conducted by J. A., one of the proprietors, in his own name, and that at Albany it should be conducted by W. M., an agent, in his name, but in behalf and upon the responsibility of the defendants, who were two of the proprietors; that no copartnership name should be used, and no paper made, accepted or endorsed in the name or on account of the copartnership; that each party should raise his share of the money needed by the concern upon his own responsibility, and the other partners were not to be liable therefor, but all the parties were to share equally in the profits. *Held*, that a bill of exchange drawn by J. A., in his own name, to raise money for the business of the concern upon, and accepted by W. M. in his name, and which was discounted by the plaintiffs, bound all the proprietors as acceptors, and that all the proprietors were chargeable as drawers; and that no notice of non-payment was necessary, the drawers and acceptors being the same persons. Bank of Rochester *v.* Monteath, 1 Den. (N. Y.) 402.

been liable; for whatever the name used may be, if it is that ordinarily employed by a partner whose business it is to attend to the bills and notes of the firm, the other partners will not be heard to say that such name is not the name of the firm for the purpose for which he has habitually used it.

Therefore, where the name of a firm was Hapgood & Co., but the managing partner was in the habit of endorsing bills of the firm in the name of Hapgood & Fowler, which had formerly been the name of the firm, it was held that such endorsement was valid, although the other partners were not shown to have authorized the use of the name in question. (*r*) [65]

Liability of persons using the wrong name.—Again, although in Faith *v.* Richmond and Kirk *v.* Blurton, the firm was held not bound, in consequence of the name of the firm not being used, those members of the firm who actually made use of the names in question were held liable; for the name used was made theirs by their own act. (*s*) Upon the *same principle, if blank bills are drawn and endorsed by a firm, and before they are negotiated one partner dies and the name of the firm is changed by the surviving partners, and the bills previously drawn and endorsed are then negotiated, these bills will be binding on the new firm, although the name on the bills is that of the old firm and not that of the new. (*t*)

*186]

Cases in which error in name is unimportant.—A bill drawn on a firm by a wrong name and accepted in its right name, binds the firm; (*u*) and a bill drawn on a firm and accepted by one partner

(*r*) Williamson *v.* Johnson, 1 Barn. & C. 146.

65. Effect of frequent use of wrong name.—In Crocker *v.* Colwell (46 N. Y. 212) one partner kept the bank account in his own name, with the knowledge and consent of the others, all partnership debts and accounts being paid by checks drawn and signed by him alone. *Held*, that the firm was liable upon such a check drawn in its business. See, also, Lemon *v.* Fox, 21 Kan. 152.

(*s*) So, in Wild *v.* Keep, 6 Car. & P. 235, a person of the name of Joseph Keep was held liable on a bill accepted by himself in the name of John Keep & Co.

(*t*) Usher *v.* Dauncey, 4 Camp. 97. If a change is made in a firm, and, by a mistake, a contract is entered into with it in its old name, the members of the new firm may sue on it, provided the other party is not prejudiced by their so doing. Mitchell *v.* Lapage, Holt, N. P. Cas. 253. But see Boulton *v.* Jones, 2 Hurlst. & N. 564.

(*u*) Lloyd *v.* Ashby, 2 B. & Ad. 23.

in his own name only has been held to bind the firm on the ground that the word "accepted," if written by one of the partners, is sufficient without any signature; and that his signature, if affixed, may be treated as redundant. (*x*) But there is no other case in which a firm is liable on a negotiable instrument, made, drawn or endorsed in the name of one of the partners only, (*y*) unless, indeed, his name is the name of the firm. (*z*) Even a bill drawn on one partner and accepted by him on behalf of the firm does not bind the firm, the other partners not being drawees. (*a*) [66]

A bill drawn on a firm and accepted by one partner in the name of the firm and in his own name, does not bind him separately if the firm is bound by his acceptance. (*b*) But if he has no authority to bind the firm, he is himself liable on the bill. This was held in Owen *v.* Van Uster, (*c*) where a bill was drawn on "The Allty-Crib Mining Company," and was *accepted "*per proc.* The Allty-Crib Mining Company, W. T. Van Uster, London, Manager." It was held that Van Uster was personally liable on this bill, he being one of the company on which the bill was drawn, and therefore one of the drawees and also an acceptor. [*187

c. *Promissory notes.*—Thirdly, as regards promissory notes. With respect to promissory notes the following rules are deducible from the cases:

1. *Promise by one partner.*—If a partner promises for himself, and not for himself and copartners, he only is liable on the note, though he may promise to pay a partnership debt. (*d*) [67]

(*x*) Mason *v.* Rumsey, 1 Camp. 384; Jenkins *v.* Morris, 16 Mees. & W. 879; Byles on Bills (11th ed.) 43 and 45; Id. (14th ed.), p. 47, *et seq.* In such a case the acceptor may also be sued alone. See *infra*.

(*y*) Emly *v.* Lye, 15 East 7; Ex parte Bolitho, Buck 100; Lloyd *v.* Ashby, 2 Car. & P. 138; Williams *v.* Thomas, 6 Esp. 18.

(*z*) As to which, see *ante* pp. *182, *183.

(*a*) Nicholls *v.* Diamond, 9 Ex. 154; Mare *v.* Charles, 5 El. & B. 978.

66. Where a partner in a numerous firm has power to bind the firm by giving notes, a variation in the style of the company is not material. Kinsman *v.* Dallam, 5 T. B. Mon. (Ky.) 382.

(*b*) Re Barnard, 32 Ch. D. 447; Malcolmson *v.* Malcolmson, L. R., 1 Ir. Ch. D. 228.

(*c*) 10 C. B. 318. The company in this case was a mere partnership.

(*d*) Siffkin *v.* Walker, 2 Camp. 308; Murray *v.* Somerville, 2 Camp. 99, note; and see Ex parte Harris, 1 Madd. 583.

67. Promise by one partner.—It has

2. *Promise by several partners.*—If several partners sign a note in this form, "I promise to pay," all who sign the note are liable on it, jointly and severally. (*e*) 68

been held that generally, when a member of a firm makes a note, or draws a bill, in his own name, though it is known to be on the partnership account, the firm will not be bound. Re Warren, Dav. (U. S.) 320; Farmers' Bank *v.* Bayless, 35 Mo. 428; Foster *v.* Hall, 4 Humph. (Tenn.) 346.

But the better considered rule seems to be that a note, given in the individual name of one partner, is *prima facie* deemed his individual obligation, unless his partner be a dormant partner (Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416; Graeff *v.* Hitchman, 5 Watts (Pa.) 454); and in order to make such a note binding upon the firm, it must be made to appear, affirmatively, that it was given and received as a firm note, binding upon all the partners (Hubbell *v.* Woolf, 15 Ind. 204; Buckner *v.* Lee, 8 Ga. 285; Staats *v.* Howlett, 4 Den. (N. Y.) 559); and to have been intended to have a joint operation. Crozier *v.* Kirker, 4 Tex. 252. S. P., Puckett *v.* Stokes, 58 Tenn. 442; Farmers' Bank *v.* Bayless, 41 Mo. 275; Chemung Bank *v.* Ingraham, 58 Barb. (N. Y.) 290.

Chancellor Kent states the rule as follows: "In all contracts concerning negotiable paper, the act of one partner binds all; and even though he signs his individual name, provided it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation. But if a note or bill be drawn by one partner in his own name only, and without appearing to be on partnership account, or if one partner borrow money on his own security, the partnership is not bound by the signature, even though it was made for a partnership purpose, or the money applied to a partnership use. The borrowing partner is the creditor of the firm, and not the original lender. If, however, the bill be drawn by one partner, in his own name, upon the firm or partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. And though the partnership be not bound at law in such a case, it is held that equity will enforce payment from it, if the bill was

(*e*) Clarke *v.* Blackstock, Holt N. P. Cas. 474; March *v.* Ward, 1 Peake (3d ed.) 177.

68. Promise by several partners.—A note, signed by two partners with their individual names, is sufficient to bind the firm. Maynard *v.* Fellows, 43 N. H. 255; Kendrick *v.* Tarbell, 27 Vt. 512; In re Thomas, 17 Bankr. Reg. 54. But it is held that where the priority of different creditors attaching the property of a firm is to be determined by the individual or partnership character of their respective claims, the mere fact that a promissory note is signed by the individuals who compose the firm is insufficient to show that it is a partnership debt. Gay *v.* Johnson, 45 N. H. 587.

A note made by one partner, in which he says, "I promise to pay," &c., but subscribes the partnership name, "A, B & Co.," is binding on the firm, and not on the partner alone who executed it. Doty *v.* Bates, 11 Johns. (N. Y.) 544. But compare Sherwood *v.* Snow, 46 Iowa 481.

3. *Promise by one in name of firm.*—If one partner promises, in the name of the firm, to pay that for which he and not the firm is liable, the promise binds him, at all events. As an illustration of this, reference may be made to Shipton *v.* Thornton. (*f*) There the defendant, a partner in the house of Thornton & West, was solely liable to the plaintiff for certain freight, and he gave the plaintiff a note in this form : [69]

actually drawn on partnership account." 3 Kent's Com. 41–44.

In Macklin *v.* Crotcher (6 Bush (Ky.) 401) it is required that in order to bind a partner by a note drawn by his copartner in his own individual name, it must appear that such individual name was the style of the firm.

In Thayer *v.* Smith (116 Mass. 363) it is held that the accommodation endorser of a note signed by one partner, as maker, in his individual name, and by the other partner as endorser, may recover the amount he is compelled to pay as such accommodation endorser, in an action against the firm for money paid to its use.

In Arnold *v.* Camp (12 Johns. (N. Y.) 409) it is held that where a promissory note is given by a partnership, and the payee afterwards takes the individual note of one of the partners for the amount, and gives up the partnership note, it is a payment of the partnership note.

Instances.—Where two persons, by virtue of an agreement, became partners as to third persons, without any firm name, and one of the parties who transacted the business gave a note, signed in his own individual name, for goods purchased, and the payee was ignorant of the relations of the parties, it was held that the dormant partner was not liable on the note. Palmer *v.* Elliott, 1 Cliff. (U. S.) 63.

Where merchandise was delivered by partners, in payment of a note signed by one of the partners, but given for a partnership transaction, it was held that the vendors could not recover the value of the merchandise of the vendees, on the ground that it was not a note of the partnership. Owings *v.* Trotter, 1 Bibb (Ky.) 157.

A member of a firm, which was well known, purchased a horse, for which he gave his individual note. *Held*, that the partnership was not liable, although the avails of the horse, when sold, went into the partnership fund. Holmes *v.* Burton, 9 Vt. 252.

A declaration stated that the defendants, A and B, formed a copartnership, and agreed between themselves that A should buy certain goods for the firm, and execute his own note in payment, on which they should be jointly liable, whereupon A bought the goods; that in consideration of the acceptance of A's note in payment, and the delivery of the goods to the firm, the defendants promised to pay the amount of the note when it fell due. *Held* to show a good consideration for the promise of B, and that it was an original undertaking, and not a promise to pay the debt of another. Hotchkiss *v.* Ladd, 36 Vt. 593.

(*f*) 9 Ad. & E. 314. See, too, Hudson *v.* Robinson, 4 Man. & S. 475.

69. **Promise by one partner in name of firm.**—Where the articles of

"I hereby engage to pay the amount of freight, &c.,
"I am, &c.,
"R. & R. THORNTON & WEST."

On this note the defendant was held separately liable.

4. *Joint and several notes.*—One partner has no authority, as such, to bind himself and copartners jointly and severally. (*g*) But if some members of a firm make a joint and *several* promissory note, they will be personally liable, although they may have signed only on behalf of themselves and copartners; and persons signing notes in the following forms have been held liable on them as
*188] *makers, and not merely incidentally as members of the company to which they belonged:

"We jointly and severally promise to pay, &c., value received, for and on behalf of the Wesleyan Newspaper Association.

"PARKER STORY,
"JAMES WARE, } Directors." (*h*)

copartnership do not fix the name of the firm, and a contract is made by one partner for the joint account, a note executed by one for the whole, in name of himself and company, is binding upon all. Aspinwall *v.* Williams, 2 Hill (S. C.) 64.

Where a partnership is limited by articles to a particular business, if one partner make a note in the partnership name for other than such business, it lies with the person suing the note to show an assent, express or implied, on the part of the other partners to the transaction; a disclaimer of it, to any other than the party to whom the note was given, cannot be shown in evidence. Waller *v.* Keyes, 6 Vt. 257.

C, one of the partners of the firm of A, B & C, executed the following note: "Dec. 7, 1835. One day after date, due J. Sithens 267 dollars 87 cents, for work done on West River bridge for the company of A, B and C. By me, C." *Held*, that this note bound the firm. Caldwell *v.* Sithens, 5 Blackf. (Ind.) 99.

A member of the firm of "Charles G. Ramsey & Co." signed a promissory note "Chas. G. Ramsey & Co." *Held*, in a suit upon the note against the firm, that it was a question of fact whether there was any substantial difference between the signature and the firm name, and that the jury were well warranted in finding that the name and signature were the same. Tilford *v.* Ramsey, 37 Mo. 563.

A note for a firm debt, to which one partner has signed the individual names of the firm, is as good as if he signed the firm name. Holden *v.* Bloxum, 35 Miss. 381.

(*g*) Maclae *v.* Sutherland, 3 El. & B. 1, which shows that a joint and several promissory note is valid as a joint note, though it is not binding, as a several note, on any person who does not sign it.

(*h*) Healey *v.* Story, 3 Ex. 3, in which Story and Ware were sued jointly.

"We, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received, on account of the company.

"T. W. SUTHERLAND,
"J. CONNELL,
"M. BOYD,
"A. DUFF,
} Directors." (*i*)

"*Midland Counties Building Society.*

"We jointly and severally promise to pay, &c.

"W. R. HEATH,
"S. B. SMITH,
} Directors.
"W. D. FISHER, Secretary." (*k*) [70]

5. *Promise for self and copartners.*—If a partner promises for himself and copartner, this amounts to a promise by the firm. (*l*) Accordingly the firm has been held liable on notes in the following form:

"Sixty days after sight I pay A or order £200, value received.
"For J. MATTHEW,
"T. WHITSMITH,
"T. SMITHSON,
"J. MATTHEW." (*m*)

And, contrary to an older decision, (*n*) the firm has been held liable on notes in the following form:

*"*Leicester and Leicestershire Bank.*

"I promise to pay the bearer, on demand, £5, value received. [*189

"For JOHN CLARKE,
"RICHARD MITCHELL,
"JOSEPH PHILLIPS,
"THOMAS SMITH,
"RICHARD MITCHELL." (*o*)

(*i*) Penkivil *v.* Connell, 5 Ex. 381, in which Connell only was sued.

(*k*) Bottomley *v.* Fisher, 1 Hurlst. & C. 211, in which Fisher only was sued.

70. Joint and several notes.—A, B, C and D were partners, under the style of A, B & Co. C executed a note, signing the names of each of the firm. *Held*, on a plea of *non est factum*, filed by A, B and D, that C had no power to bind them by such signature; but that it constituted the note *prima facie* an individual transaction. Crouch *v.* Bowman, 3 Humph. (Tenn.) 209.

(*l*) Smith *v.* Bailey, 11 Mod. 401; Lane *v.* Williams, 2 Vern. 277 and 292; Smith *v.* Jarves, 2 Ld. Raym. 1484.

(*m*) Galway *v.* Matthew, 1 Camp. 403.

(*n*) Hall *v.* Smith, 1 Barn. & C. 407, where the form was, "I promise to pay —— for A B, C D and E F. Signed, A B," and which was held to bind A B separately.

(*o*) Ex parte Buckley, 14 Mees. & W.

SECTION VI.—LIABILITY OF PARTNERSHIPS IN RESPECT OF CONTRACTS NOT BINDING ON THEM, BUT OF WHICH THEY HAVE HAD THE BENEFIT.

Effect of having had the benefit of a contract.—It is an erroneous but popular notion that if a firm obtains the benefit of a contract made with one of its partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of a contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm, (*p*) such circumstance is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm upon a contract depends is not, "Has the firm obtained the benefit of the contract?" but, "Did the firm, by one of its partners or otherwise, enter into the contract?" (*q*)

A leading case on this head is Emly *v.* Lye. (*r*) There a partner drew bills in his own name, and sent them to an agent of the firm in order that he might get them discounted. They were discounted, and the money obtained was remitted by the agent, and was paid to the account of the firm. It was held that the firm was neither liable for the amount of the bills on the bills themselves, nor for their proceeds on the common counts. There was no loan to the partnership, no contract with it and no liability attached to the firm by the fact that the partner who alone was liable had applied the money, after *he got it, for the benefit of his co-partners as well as for the benefit of himself.

*190]

Again, in Bevan *v.* Lewis, (*s*) one partner borrowed money and executed warrants of attorney to confess judgment. The money which he obtained was applied by him for the benefit of the part-

469, and 1 Ph. 562, and Ex parte Clarke, De G. 153, reversing Ex parte Christie, 3 Mont., D. & D. 736.

(*p*) Per Rolfe, B., in Beckham *v.* Drake, 9 Mees. & W. 99, 100.

(*q*) Per Rolfe, B., *ubi supra*. See, too, Kingsbridge Flour Mill Co. *v.* The Plymouth Grinding Co., 2 Ex. 718; Ernest *v.* Nicholls, 6 H. L. Cas. 423. Similarly, the fact that one partner only has obtained the benefit of a contract does not show conclusively that the firm is not bound. Ex parte Bonbonus, 8 Ves. 544.

(*r*) 15 East 7.

(*s*) 1 Sim. 376.

nership, and was obtained in part with the knowledge of his co-partner, in order that it might be so applied. But it was held that the partnership was not liable for the money, the loan having been clearly made to the one partner against whom alone judgment was to be entered, and not to the firm through him.[71]

Money borrowed by one partner.—So, in ordinary cases, when one partner borrows money without the authority of his copartners, the contract of loan is with him and not with the firm, and the nature of that contract is not altered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit, (*t*) unless he can bring himself within the equitable doctrine referred to below.[72]

71. **Effect of having had the benefit of a contract.**—A firm is not liable for debts contracted by the partners before the firm commenced, though the property for which the debt had been contracted had been introduced among the partnership property; nor with rent on a lease to a partner. Brooke *v.* Evans, 5 Watts (Pa.) 196.

But where a note is made in the partnership name by one member without the authority of the other, who, however, makes no objection when informed thereof, he is, if benefited as partner, jointly bound. Otherwise, where in the absence of authority he has not impliedly ratified or been benefited by the transaction. Stewart *v.* Caldwell, 9 La. Ann. 419.

So, also, a lease under seal, executed by one partner in the name of the firm as lessees, the firm occupying thereunder for two years, paying rent directly to the lessor, is evidence of an agreement for a lease, which, as they have had the benefit of it, will be enforced against the surviving partners after the death of him who executed it. Kyle *v.* Roberts, 6 Leigh (Va.) 495.

And where one partner, negotiating as such, with a stranger for the doing of a certain thing, makes a promise, on the strength of which the agreement to do that thing is made and carried out with the firm, the firm is liable on the promise. Pond *v.* Starkweather, 99 N. Y. 411.

(*t*) See Smith *v.* Craven, 1 Cromp. & J. 500; Hawtayne *v.* Bourne, 7 Mees. & W. 595; Burmester *v.* Norris, 6 Ex. 796; Ricketts *v.* Bennett, 4 C. B. 686; The Worcester Corn Exchange Co., 3 De G., M. & G. 180; Fisher *v.* Tayler, 2 Hare 218. In all these cases the firm got the benefit of the money borrowed, and yet was held not liable to repay it.

72. **Money borrowed by one partner.**—The rule is settled that a firm is not rendered liable for money loaned to one partner, upon his individual credit, by the mere fact that the money was afterward applied to the benefit of the firm. Union, &c., Bank of Memphis *v.* Day, 12 Heisk. (Tenn.) 413; Peterson *v.* Roach, 32 Ohio St. 374. But in Siegel *v.* Chidsey (28 Pa St. 279), where money was obtained on the personal credit of one partner, but used solely for partner-

Goods supplied to one partner.—The same rule applies to goods, services and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent as well as of his real authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation towards that person by reason of the circumstance that it gets the benefit of what he has done. (*u*) The principle of these decisions governs those cases in which one partner, in breach of trust, but without the knowledge or consent of his copartners, *applies trust money over which he has control as a trustee, to the purposes of the firm. The fact that the firm has been benefited by the money in question does not necessarily render it liable to the owners of the money. (*x*) [73] [*191

Equitable doctrine in these cases.—Where, however, the money borrowed by one partner in the name of the firm, but without the authority of his copartners, has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied, and the same rule extends to money *bona fide* borrowed and applied for any other legitimate purpose of the firm. (*y*) This doctrine is founded

ship purposes, it was held that this was a good consideration for a subsequent promise of the firm to pay the debt.

(*u*) See, in addition to the cases already cited, Kingsbridge Flour Mill Co. *v.* Plymouth Grinding Co., 2 Ex. 718; Lloyd *v.* Freshfield, 2 Car. & P. 325, and 9 Dowl. & R. 19; Galway *v.* Matthew, 10 East 264; Kilgour *v.* Finlyson, 1 H. Bl. 155; Ex parte Wheatly, Cooke's Bank L. (8th ed.) 534; Ball *v.* Lanesborough, 5 Bro. P. C. 480; Ex parte Peele, 6 Ves. 603, 604; Ex parte Hartop, 12 Id. 352.

(*x*) Ex parte Apsey, 3 Bro. C. C. 265; Ex parte Heaton, Buck 386. See *ante* p. *160.

73. See *supra*, p. *304, note 72.

(*y*) The leading cases on this subject are Ex parte Chippendale (the German Mining Co.'s case), 4 De G., M. & G. 19; The Cork and Youghal Rail. Co., L. R., 4 Ch. 748; Blackburn Building Society *v.* Cunliffe, Brooks & Co., 22 Ch. D. 61, and 9 App. Cas. 857, and 29 Ch. D. 902; Baroness Wenlock *v.* River Dee Co., 19 Q. B. D. 155. The case of infants is analogous; an infant is liable for necessaries; but he was not liable at law for money lent, though applied in the purchase of necessaries. Darby *v.* Boucher, 1 Salk. 279. But otherwise in equity, Marlow *v.* Pitfield, 1 P. Wms. 558. So, a husband was not, at law, liable for money lent to his wife to enable her to obtain necessaries, and applied by her

partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money, and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bona fide* incurred by him for the legitimate purpose of relieving the firm from its debts or of carrying on its business. (*z*) The equitable doctrine in question is limited in its application to cases falling under one or other of the principles above indicated. (*a*) [74]

for that purpose. Knox *v.* Bushell, 3 C. B. (N. S.) 334. But see, in equity, Jenner *v.* Morris, 1 Drew. & S. 218, and 3 De G., F. & J. 45; Deare *v.* Soutten, 9 Eq. 151; and observe that in the last case the plaintiff had no ground for suing in equity, except his inability to recover at law.

(*z*) See *infra*, book III., ch. 3, § 1.

(*a*) See, in addition to the cases cited in note (*y*), National Permanent Benefit Building Society, 5 Ch. 309; Magdalena Steam Nav. Co., Johns. 690; Athenæum Life Ins. Soc. *v.* Pooley, 3 De G. & J. 294.

74. **Equitable doctrine in these cases.**—One partner is liable for the acts of another partner, whereby deceptive appearances are created in land which is the subject of the partnership, and whereby the partnership realizes the proceeds of the fraud. Chester *v.* Dickerson, 52 Barb. (N. Y.) 349.

Though the payee of a partnership note believed that the proceeds of the note were to be applied to the individual debts of one of the firm, the note would still be binding on the firm, if the proceeds were in fact used by the firm. Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11.

*192] # *CHAPTER II.

OF THE NATURE, EXTENT AND DURATION OF THE LIABILITY OF INDIVIDUAL MEMBERS OF PARTNERSHIPS TO CREDITORS.

SECTION I.—NATURE OF THE LIABILITY, *192.
1. *As regards contracts*, *192.
2. *As regards torts and frauds*, *198.
SECTION II.—EXTENT OF THE LIABILITY, *200.
SECTION III.—DURATION OF LIABILITY, *201.
1. *Commencement of liability*, *201.
2. *Termination of liability*, *210.
a. As to future acts, *210.
b. As to past acts, *223.
(1) *Payment*, *225.
(2) *Release*, *237.
(3) *Substitution of debtors and securities*, *239.
(4) *Lapse of time*, *257.

Nature and extent of a partner's liability.—Having examined in the preceding pages the liabilities of a firm for the acts of its members, it is proposed in the present chapter to investigate the liability of the individual partners in respect of such obligations as, upon the principles already discussed, are binding on them all.

SECTION I.—NATURE OF THE LIABILITY.

1. *As regards contracts.*

No several liability on contracts binding the firm.—An agent who contracts for a known principal is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract on behalf of his

firm is not liable on that contract except as one of the firm; in other words, the contract is not binding on him separately, but only on him and his copartners jointly. (*a*) One partner may render himself separately liable by holding himself out as the only member of the firm, (*b*) or by so framing the contract as to bind himself separately from his copartners as well as jointly with them; (*c*) but unless there are some special circumstances of this sort, a contract which is binding on the firm is binding on all (*d*) *the partners jointly and on none of them severally. There is [*193 no difference in this respect between law and equity, (*e*) except that which arises from the equitable jurisdiction to rectify mistakes and from the principles adopted by courts of equity in administering the estates of deceased partners. (*f*) These principles will be investigated at a later period in book IV., ch. 3.[1]

(*a*) See Ex parte Buckley, 14 Mees. & W. 469; Re Clarke, De G. 153; Ex parte Wilson, 3 Mont., D. & D. 57.

(*b*) Bonfield *v.* Smith, 12 Mees. & W. 405; De Mautort *v.* Saunders, 1 B. & Ad. 398.

(*c*) See *ante* p. *179, *et seq.*, and Ex parte Harding, 12 Ch. D. 557; Higgins *v.* Senior, 8 Mees. & W. 834; Ex parte Wilson, 3 Mont., D. & D. 57.

(*d*) Not including dormant partners. Beckham *v.* Drake, 9 Mees. & W. 79; Brett *v.* Beckwith, 3 Jur. (N. S.) 31, M. R.

(*e*) Kendall *v.* Hamilton, 4 App. Cas. 504, and 3 C. P. D. 403.

(*f*) Ib., where the whole law on this subject will be found carefully examined.

1. **No several liability on contracts binding on the firm.**—The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all, and on each of the partners. Barry *v.* Foyles, 1 Pet. (U. S.) 311. Compare Woodworth *v.* Spafford, 2 McLean (U. S.) 168.

Where, on dissolution, a portion of the members of the firm continued the business, and the plaintiff, who had occupied the position of bookkeeper to the old firm, kept on in that position with the new firm, and carried a balance due him for services into his account with the new firm, which account, as thus made up, the new firm afterwards paid, without knowing that it contained anything due on the part of the old firm, it was held that plaintiff was entitled to retain the money so received, as the members of the new firm were personally liable for the debts of the old one. Strong *v.* Niles, 45 Conn. 52.

In an action against the members of an unincorporated association, sued as partners, the court will not delay the relief to which the plaintiff is entitled as against all the defendants, pending an inquiry instituted by the defendants to ascertain which of them, as between themselves, is primarily liable for the debt. Manning *v.* Gasharie, 27 Ind. 399.

A partnership between four was dissolved by the death of one, and letters of

Partnership debts not several as well as joint.—It has often been said that in equity partnership debts are separate as well as joint; but this proposition is inaccurate and misleading. It is true that a creditor of a partnership can obtain payment of his debt out of the estate of a deceased partner, (*g*) but the judgment which such a creditor obtains is quite different from that which a separate creditor is entitled to, (*h*) and it is a mistake to say that the joint creditor of the firm is also in equity a separate creditor of the deceased partner. (*i*) In bankruptcy the joint debts of a firm are never treated as joint and several, and yet in bankruptcy equitable as well as legal principles are always recognized. [2]

administration on his estate were taken out by a surviving member. The survivors, having formed a new firm, took the stock, and each gave his note for one-third of said stock, at an appraised value, payable to the firm. *Held*, that the three were chargeable jointly for the whole value of the stock. Washburn *v.* Goodman, 17 Pick. (Mass.) 519.

A plaintiff suing a firm must show a joint contract or joint promise, express or implied. Sager *v.* Tupper, 38 Mich. 258.

In Mississippi, all partnership contracts are declared by statute to be joint and several; therefore, in a suit against one partner, counts on a firm debt for which he is severally liable, may be joined with counts on an individual debt, but if the creditor treat the contract as joint, by suing all the partners, he must prove a joint contract as alleged, and cannot amend by discontinuing as to part of the defendants and joining a count on a contract by one only, in order to meet the proof which is of such a contract. Miller *v.* Northern Bank, &c., 34 Miss. 412.

A suit was brought against two as partners; both were served with process; both appeared and pleaded jointly; notice to produce a book containing the contract on which the action was brought was given to both, and it was produced. The contract was in the name of the firm, and was proved to be in the handwriting of one of the defendants. Upon the trial, an admission was made by the counsel acting for both defendants that a certain amount of labor was done by plaintiff for defendants, and certain payments made to him. *Held*, that the evidence was sufficient to establish a joint liability on the part of the defendants. Balliett *v.* Fink, 28 Pa. St. 266.

The liability of a partner is to be determined by the law of the place where the partnership is carried on, and not where the debt was incurred. Hastings *v.* Hopkinson, 28 Vt. 108.

(*g*) See the next note. Hoare *v.* Contencin, 1 Bro. C. C. 27, shows that this was not always the case.

(*h*) See Re Barnard, 32 Ch. D. 447; Hills *v.* M'Rae, 9 Hare 297; Re Hodgson, 31 Ch. D. 177; Re McCrae, 25 Id. 16, and *post*, book IV., ch. 3.

(*i*) Except in partnership cases the liability in equity on a joint contract is the same as at law. Other *v.* Iveson, 3 Drew. 177; Jones *v.* Beach, 2 De G., M. & G. 886; Rawstone *v.* Parr, 3 Russ. 539.

2. Partnership debts not several as

In Kendall *v.* Hamilton (*k*) two out of three partners were sued for a partnership debt, and judgment was recovered against them. Afterwards the plaintiffs, having discovered that the defendant Hamilton was a member of the firm, sued him for the same debt, which was still unsatisfied. But it was held that the action could not be maintained, for the liability of Hamilton was a joint liability only, and the judgment obtained against his copartners was a bar to another action against him.

Effect of judgment against some partners.—This case would have presented no difficulty before the passing of the Judicature acts, but it was contended that Hamilton's liability was, in equity, several as well as joint, and that since the passing of the Judicature acts he could be sued *notwithstanding the judgment recovered against his copartners. This construction, however, was decided to be unsound, and it did not prevail. Before the passing of the Judicature acts, the Court of Chancery would have had no jurisdiction in such a case as Kendall *v.* Hamilton, and there were no circumstances importing equitable considerations into it.

*194]

Effect of judgment against surviving partners.—It must not, how-

well as joint.—A debt due from partners, in a suit against both, may be recovered against either, and either may be compelled to pay the whole. Although due from the company, it is also due from each member of the company, and the claim of the creditor for its satisfaction extends to the whole property of each member of the firm, as well as to the joint property of the firm. Tucker *v.* Oxley, 5 Cranch (U. S.) 34; reversing S. C., 1 Cranch C. C. 419.

In an action against A. & W., former partners, on an alleged joint indebtedness for goods sold and delivered, A.'s answer denied the sale and delivery, but admitted that the goods were left with the defendants for sale on commission, and that sales of the same were made to a certain amount, for which an indebtedness was admitted; and W.'s answer admitted in part the sale and delivery and indebtedness alleged. The plaintiffs, in reply, denied the statement in A.'s answer, and moved for judgment on the pleadings. *Held*, that the motion was rightly denied, and judgment of dismissal properly rendered. Such a state of the pleadings furnishes no basis for a several judgment against either of the defendants. Beatty *v.* Ambs, 11 Minn. 331.

In an action against several as partners, although but one of the defendants be brought into court, if he appears and pleads the general issue, the plaintiff is not entitled to recover, unless he establishes a joint liability of the defendants. Halliday *v.* McDougal, 20 Wend. (N. Y.) 81; S. C., 22 Id. 264.

(*k*) 4 App. Cas. 504, and 3 C. P. D. 403. This case arose after the Jud. acts

ever, be inferred from Kendall *v.* Hamilton that if a creditor of a firm sues the surviving partners and recovers judgment against them he cannot obtain payment of his demand out of the assets of a deceased member of the firm. The contrary is well established by a long series of cases which are in no way affected by Kendall *v.* Hamilton.

Equitable doctrine illustrated.—It has long been held that a creditor of a firm is himself entitled to obtain payment from the estate of the deceased, even although he may have taken as a security for his debt a bond or covenant binding the partners jointly. (*l*)

Thus, in Bishop *v.* Church, (*m*) two partners borrowed £2000, for which they afterwards gave their joint bond. One of them then died and the other became bankrupt. A bill was filed by the creditor for payment of the bond out of the estate of the deceased partner, and it was held that his estate continued liable notwithstanding that it was discharged at law, the bond being joint, and not joint and several. In this case it was also held that the bond ought to be treated as joint and several so as to make the estate of the deceased partner liable as for a specialty debt and not as for a simple contract debt, as would have been the case without the bond. (*n*)

In Beresford *v.* Browning (*o*) four partners agreed that on the death of any of them the survivors should not be bound to *pay out his capital at once, but should pay it by certain instalments, as ascertained at the last preceding stock-taking. [*195 The agreement did not purport to bind the survivors jointly and severally. But it was held that even if they were at law bound only jointly, they were liable in equity severally as well as jointly,

came into operation.

(*l*) See, in addition to the cases cited in the next few notes, Primrose *v.* Bromley, 1 Atk. 90; Darwent *v.* Walton, 2 Atk. 510; Lane *v.* Williams, 2 Vern. 292; and see Sleech's Case, 1 Mer. 539; Devaynes *v.* Noble, 2 Russ. & M. 495, and the cases there commented on; Smith *v.* Smith, 3 Giff. 263. The cases only relate to mercantile partnerships, but *quære* if there is any difference in this respect between them and other partnerships.

(*m*) 2 Ves. Sr. 100 and 371. Simpson *v.* Vaughan, 2 Atk. 31, is a very similar case.

(*n*) The following cases are to the same effect as Bishop *v.* Church, viz.: Simpson *v.* Vaughan, 2 Atk. 31; Thomas *v.* Frazer, 3 Ves. 399; Burn *v.* Burn, Id. 573; Orr *v.* Chase, 1 Mer. 729, appendix.

(*o*) 20 Eq. 564, and 1 Ch. D. 30.

and that the executor of the partner first dying was entitled to be paid the amount due to him out of the estate of a surviving partner, who had himself died, and was not restricted to suing the ultimate surviving partner.

Effect of judgment.—Nor, if the creditor sues the surviving partners and obtains judgment against them, will he be therefore precluded from proceeding to enforce his original claim against the estate of the deceased partner. (*p*) In the case here supposed the judgment does not affect his estate. So, if the creditor of the firm first seeks payment out of the estate of a deceased partner, he is not precluded from afterwards suing the surviving partner. (*q*)

Effect of rule on creditors inter se.—The doctrine acted on in Bishop *v.* Church and other cases of the same sort is applied, not only for the benefit of creditors against the partners and their representatives, but also as between competing creditors. This was settled in Burn *v.* Burn. (*r*) In that case, partners being indebted to a large amount, gave to their creditor a joint bond; one of the partners died, the others afterwards became insolvent, and a bill was filed by the bond creditor for payment out of the estate of the deceased partner. Two questions then arose between the plaintiff and the simple contract creditors of the deceased partner, viz., first, whether the plaintiff could rank as a creditor at all against the assets of the deceased; and, secondly, whether, if he could, he should rank as a specialty or only as a simple contract creditor. The court decided both questions in favor of the plaintiff, and held that he was entitled to rank as a specialty creditor, although the consequence was that after satisfying his demand, little remained for payment of the other creditors.

*196] **Cases where the equitable and legal liabilities are the same.*—But even in administering the estate of a deceased partner it must not be supposed that every joint debt contracted by the firm is payable out of his assets. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding them-

(*p*) Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24; Jacomb *v.* Harwood, 2 Ves. Sr. 265.

(*q*) Re Hodgson, 31 Ch. D. 177.

(*r*) 3 Ves. 573, and see Simms *v.* Barry, there cited.

selves jointly and not severally, and if such contract is not a mere security for the payment of a debt, or for the performance of a joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be, in equity as in law, to impose a joint obligation and no other. (*s*)

A leading case on this head is Sumner *v.* Powell. (*t*) There, one of a firm of partners died, the firm being at the time of his death liable for a breach of trust committed by one of its members. A new partner was admitted into the firm and a deed was executed between the executors of the deceased partner and the surviving partners and the new partner, whereby, in consideration of certain payments by the executors and of a release by them of all demands, the surviving partners and the new partner covenanted *jointly* to indemnify the executors from the debts and liabilities of the old firm. A suit was afterwards instituted in respect of the breach of trust, and the executors were ordered to make good the same out of the assets of their testator. The executors then filed a bill to be indemnified out of the estate of the new partner, and contended that the covenant into which he had entered, though joint in form, ought to be considered as joint and several. But it was held otherwise, for the obligation of the new partner to indemnify the plaintiffs existed only by virtue of his covenant, and the extent of the obligation could therefore be measured only by the words of such covenant.

Again, in Clarke *v.* Bickers, (*u*) a lease was made to two partners jointly of lands wanted by them for partnership purposes. The demise and lessees' covenants were all joint. *After the death of one of the partners his executors were sued in [*197 equity in respect of various breaches of covenant, and it was contended that the covenants ought to be treated as joint and several. But it was held on demurrer that no equity arose to the lessor from the fact that the lessees were copartners; the lessor determined for himself how his leases should be granted. The demurrer was consequently allowed.

(*s*) See, in addition to the cases noticed in the text, Richardson *v.* Horton, 6 Beav. 185; Jones *v.* Beach, 2 De G., M. & G. 886; Other *v.* Iveson, 3 Drew. 177; Rawstone *v.* Parr, 3 Russ. 424, 539.

(*t*) 2 Mer. 30; affirmed on appeal, Turn. & R. 423.

(*u*) 14 Sim. 639.

The same doctrine was acted on and even carried further in Wilmer *v.* Currey. (*x*) In that case three partners dissolved partnership, one of them, the plaintiff, retiring. By a deed made between the three partners, the plaintiff assigned all his share and interest to the other two, and they *jointly* covenanted to pay the debts of the firm, and to indemnify the plaintiff therefrom and to pay the plaintiff certain sums of money. One of the two continuing partners having died and the covenants not having been performed, the plaintiff filed his bill against the surviving partner and the executors of the deceased partner in order to obtain the sums remaining due to him and to have the unliquidated partnership debts paid. But it was held on demurrer that the plaintiff had no equity against the estate of the deceased partner; *for although that partner was, irrespectively of the deed, liable to contribute towards payment of the partnership debts*, that was different from the obligation which arose by virtue of the covenant of which the plaintiff sought the benefit. It is, however, difficult to reconcile this case with Beresford *v.* Browning. (*y*)

Joint liability in cases of holding out.—A creditor who alleges that A, B and C are his debtors can, it is apprehended, prove his case by showing that one of them contracted on behalf of all three and that the other two are estopped from denying his authority to do so. Cases in which persons have been held jointly liable on this principle are to be found in the books. (*z*) The case of Scarf *v.* Jardine, (*a*) which seems at first sight to throw some doubt on this doctrine, is really not opposed to it. In that case S. & R. carried on business in partnership under the name of R. & Co. *S. retired. R. continued the business in the old name, and took another person into partnership with him. J. was a customer of the old firm; he had no notice of S.'s retirement, and he continued to deal with and became a creditor of the new firm. J. then was made acquainted with the fact that S. had retired; but J. nevertheless sued the new firm for their debt to him, and on their bank-

*198]

(*x*) 2 De G. & S. 347.

(*y*) The Court of Appeal, however, thought the two might be distinguished. See 1 Ch. D. 30.

(*z*) Waugh *v.* Carver, 1 H. Bl. 235, and other cases of holding out, *ante* p. *40, *et seq.*

(*a*) 7 App. Cas. 345.

ruptcy he proved against their estate. He then sought to recover the same debt against S.; but it was decided that S. was not liable. It was held that J. had the option of suing the new firm or S., but that J. could not sue the new firm and S. jointly, and that having elected to sue the new firm, he could not afterwards sue S., who was not in fact a member of it. The importance of this case turns on the grounds on which it was held that J. could not have sued S. jointly with the members of the new firm. The reason why he could not have done so was that J. did not in fact contract with the new firm upon the faith that S. was a member of it. (*b*) If it had been proved that J. had so contracted, he could, it is apprehended, have sued S. and the other members of the new firm, and have proved S. to have been a partner by estoppel.

2. *As regards torts and frauds.*

Torts create joint and several liabilities.—For torts imputable to a firm, all the partners are liable jointly and severally. (*d*) To this general rule an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally. (*e*) [3]

Distinction between torts and breaches of contract.—Although for general purposes it may be convenient to distribute acts and forbearances which give rise to obligations under the heads "Breach of Contract" and "Tort," it would not be difficult to show the im-

(*b*) See 7 App. Cas. 350, per Lord Selborne, and 357, 358, per Lord Blackburn.

(*d*) Mitchell *v.* Tarbutt, 5 T. R. 649; 1 Wms. Saund. 291 *f* and *g*; Com. Dig., "Abatement," F, 8.

(*e*) See 1 Wms. Saund. 291 *f* and *g*.

3. Torts create joint and several liabilities.—Where partners assign property to a creditor as security for the debt, and he intrusts such property to the partners to sell, as his agents, and to pay over the proceeds to him, they do not become liable, upon sale of the property, as tort feasors, as upon an unauthorized disposal thereof. Their liability rests upon contract, not upon tort, and is necessarily joint, not several. Harris *v.* Schultz, 40 Barb. (N. Y.) 315.

An action on the case for negligence occasioning the loss or destruction of a slave hired by plaintiff to a copartnership, may be maintained against one of the members of the firm, without joining the other partners. So, if the negligence be that of an agent of the copartnership. White *v.* Smith, 12 Rich. (S. C.) 595.

possibility of always distinguishing between the two.(*f*) And yet if a breach of a contract binding *on the firm imposes a joint liability only on its living members (as to which, see [*199 *ante* pp. *192, *193), whilst a tort imputable to the firm imposes a joint and several liability, the importance of being able accurately to distinguish between a breach of contract and a tort becomes apparent. The difficulty, however, of doing so is increased by the doctrine that there are cases in which the same breach of an obligation may be regarded from two different points of view, and may, at the option of the person injured, be made the foundation either of an action *ex contractu* or of an action *ex delicto*.(*g*) Suppose, for example, that property is entrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so entrusted. This breach of duty is a breach of the contract which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract, amounting in effect to a conversion or destruction of that which belonged to the customer.

Breaches of trust impose joint and several liabilities.—In equity the misapplication of the money is a breach of trust and imposes a joint and several liability on all the partners, on the ground that each partner is bound to see to the proper application of what is entrusted to the firm. (*h*) In such cases as these the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which, upon the principles of agency, can be imputed to the firm, each member thereof is in equity severally liable for such act just as much as if there had been no fraud in the case; (*i*) and it is

(*f*) See Pollock on Torts, ch. 13.

(*g*) See, on this subject, Brown *v.* Boorman, 11 Cl. & F. 1, and the cases there referred to. See, also, Bryant *v.* Herbert, 3 C. P. D. 389; Fleming *v.* Manchester, Sheffield and Lincolnshire Rail. Co., 4 Q. B. D. 81.

(*h*) See Re Oxford Benefit Building Soc., 35 Ch. D. 502; Ex parte Adamson, 8 Ch. D. 807; and *ante* p. *161 note (*f*).

(*i*) See Ex parte Adamson, 8 Ch. D. 807; Vulliamy *v.* Noble, 3 Mer. 619; Clayton's Case, 1 Mer. 576; Warde's Case, Id. 624.

well established in equity that a breach of trust which is imputable to several *persons imposes upon them a liability which is both joint and several. (*k*)

*200]

The effect of the Judicature acts on this subject has not yet been judicially determined, but probably breaches of contract which are also breaches of trust will be held to impose several as well as joint liabilities both at law and in equity. In Ex parte Adamson (*l*) a partnership debt contracted by fraud was held to be joint and several, and to be provable in bankruptcy against the joint estate of the firm or against the separate estates of its members at the option of the creditor.

SECTION II.—EXTENT OF LIABILITY.

Extent of partner's liability at common law.—By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners ratably, but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves. (*m*)

(*k*) Re National Funds Assur. Co., 10 Ch. D. 118. See, also, the cases in the last two notes, and Devaynes *v.* Noble, Sleech's case, 1 Mer. 563; Baring's Case, Id. 614; Brydges *v.* Branfill, 12 Sim. 369; Wilson *v.* Moore, 1 Myl. & K. 127, 337. Compare, however, Parker *v.* McKenna, 10 Ch. 123, and Vyse *v.* Foster, L. R., 7 H. L. 318, as to liability for profits arising from breaches of trust.

(*l*) 8 Ch. D. 807, per James and Baggally, L. JJ., Lord Bramwell dissenting. See, as to breaches of trust, Ex parte Sheppard, 19 Q. B. D. 84; and *ante* note (*h*).

(*m*) See per De Grey, C. J., in Abbott

Attempts to limit liability.—Various attempts have been made from time to time to form partnerships without exposing their members to ruin in the event of loss. But the only effectual method of accomplishing this object is to stipulate with each creditor that he shall only be paid out of the funds of the partnership, and that he shall not be entitled to require the individual partners to pay more than a certain amount of those funds. Such stipulations, however, are never made in practice except where the partners are numerous, and in modern times they are practically confined to insurance and other companies formed before the passing of the Companies act, 1862. The cases on this subject will be found collected in the volume relating to companies. (*n*) The statute under which a person may share profits without incurring the liability of a partner has been already alluded to. (*o*) [4] [*201

v. Smith, 2 W. Bl. 949, and Wooley *v.* Kelley, 1 Barn. & C. 68; Com. Dig., "Execution," H. See further on this subject, *infra*, ch. 3, § 3.

(*n*) The leading cases on this subject are Halket *v.* Merchant Traders' Loan Assoc., 13 Q. B. 960; Hassell *v.* Same, 4 Ex. 525; Hallett *v.* Dowdall, 18 Q. B. 2; Durham's Case, 4 Kay & J. 517; Re Athenæum Soc., Johns. 80, and 3 De G. & J. 660.

(*o*) 28 and 29 Vict., c. 86, *ante* book I., ch. 1, § 2.

4. **Extent of partner's liability at common law.**—The liability of a partner to a third person is not increased by the fact that an individual debt of his has been assumed by the partnership of which he is a member. Bogereau *v.* Guéringer, 14 La. Ann. 478.

A law partnership is an ordinary one, and the partners are bound jointly, and not *in solido*. Dyer *v.* Drew, 14 La. Ann. 657; Jones *v.* Caperton, 15 Id. 475.

When there is a prayer in the petition for general relief, and the partnership sued is alleged to be a commercial one, a judgment rendered against the parties *in solido* will not be disturbed on the ground that a joint judgment was claimed in the petition. Taylor *v.* Hancock, 14 La. Ann. 693.

Where a suit is brought against persons bound jointly and severally according to law, as commercial partners, a judgment rendered against them carries solidarity with it, even when not expressed in it. Bell *v.* Massey, 14 La. Ann. 831.

Where it appears that the two individual signers of a merely joint note were, at the time, commercial partners, and that the note was given for money borrowed for and used by the firm, each maker is liable *in solido*. Mitchel *v.* Darmond, 30 La. Ann. 396.

Partners in a plantation are jointly bound each for one-half of all debts contracted by them for the benefit of the firm. Dupre *v.* Bods, 33 La. Ann. 495.

Where two firms agree to pack pork on joint account, this will not effect the consolidation of the firms or make either liable for the previous debts of the other. Meader *v.* Hughes, 14 Bush (Ky.) 652.

SECTION III.—DURATION OF LIABILITY.

In a preceding chapter it was shown that every member of an ordinary partnership is the general agent of the firm for the purpose of carrying on its business in the ordinary way. In the present section it is proposed to ascertain the duration of such agency, or, in other words, when it begins and when it ends. The mode whereby a partner becomes discharged from liabilities incurred by him will then be considered, and thus the liabilities of incoming and outgoing partners to creditors will be determined.

1. *Commencement of liability.*

Commencement of agency.—The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way is based upon the ground that the ordinary business of a firm cannot be carried on either to the
*202] advantage *of its members or with safety to the public, unless such a doctrine is recognized. The existence of a partnership is, therefore, evidently presupposed; and although persons negotiating for a partnership, or about to become partners, *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases, in fact, arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners; and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no

Where it is sought to charge several as partners in a stock speculation, the plaintiffs having been the brokers employed, and the defence being that each of the defendants was, by special agreement, liable for his own share of the loss only, it is proper to show that one of the defendants had a separate stock account with the plaintiff. Binney *v.* Young, 5 Daly (N. Y.) 329.

partnership there is no implied authority similar to that which exists after a partnership is formed. (*p*) [5]

(*p*) See the cases, *ante* pp. *19, *et seq.*, and *43, *et seq.*; and especially Edmundson *v.* Thompson, 2 Fost. & F. 564; Gabriel *v.* Evill, 9 Mees. & W. 297.

5. Commencement of agency.— Mr. Gow, in his work on Partnership, says, pp. 151, 152, 153: "A joint contract, however, entered into by one or more individuals, is binding only upon those who have a joint interest in it at the time of its inception; for no subsequent act by any person who may afterwards become a partner, not even an acknowledgment that he is liable, will entail upon that person the obligation of fulfilling such a contract, if it clearly appear that a partnership did not exist at the time the contract was made. The joint interest must be contemporaneous with the formation of the contract itself, to superinduce the corresponding liability to perform it. If it were otherwise, the law would, in fact, create a supposed contract, when the real contract between the parties was consummated, before the joint interest and consequent joint risk was in existence. Thus, where several persons agreed upon a maritime adventure, and to provide a cargo of goods which should, in the judgment of the majority, be proper for the voyage; and permission was given to the supercargo (who was to have a proportionate profit, and bear an equal loss with the respective adventurers) to ship, on the joint account, as many goods as he might think fit; such goods being first approved by a majority of the persons concerned in the adventure, as proper for the voyage; and it was afterwards agreed that each party was to hold no other share or proportion in the adventure than the amount of what each separately ordered and shipped; and that the orders given for the cargo and outfit of the ship were to be separately paid, and that one was not to be bound for any goods or stores ordered or shipped by the other; and that the supercargo should have free liberty to ship what goods were suitable to the voyage, over and above the ship and outfit, leaving room for those ordered by the adventurers; and that the ship should be made over in trust for the general concern—it was held that if the supercargo afterwards purchased goods, as part of the cargo, and the ship sailed with the goods so purchased, he alone was liable for them, and not his co-adventurers jointly with him. The reason on which this determination proceeded seems to have been that after the purchase of the goods made by the several adventurers there was still, before they became joint property, a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint adventure, and until that further act was done, the goods purchased by each remained the separate property of the purchaser. The partnership in the goods did not arise until their admixture in the common adventure. * * * It is not, however, sufficient to constitute a joint liability for the capital brought into the trade, that there is to be a subsequent participation in the profit derived from it. In such a case the right to participation can only take its origin from the time of the introduction of the capital; and although communion of profit is a strong circumstance to explain a contract in itself doubtful, and to show, as the legal presumption is, that a

Liability of partners who defer the execution of articles.—But although this is undoubted law, still if persons agree to become partners as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed. (*q*) For the question in such a case is not "When was the deed executed?" but rather this, "When did the partners commence to carry on business as such?" The agency begins from that time, whether they choose to execute any partnership deed or not.

Where there is an agreement for a partnership and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement. (*r*) [6]

Firm not liable for what a partner does before he joins it.—The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for *what may be done by any partner before he becomes a member thereof. So that if several persons agree to become partners and to con- [*203

partnership existed at the time amongst the participants, yet, where the nature of the contract clearly appears, it cannot have such a retrospect as to alter it, and to substitute the responsibility of several for that of an individual contractor. Therefore, if several persons agree to form a partnership, and that each shall contribute a certain share of the capital, and any of the persons borrow or purchase the share which is by him afterwards brought into the common stock, the liability for payment to the lender or vendor is not joint, but personal."

(*q*) Battley *v.* Lewis, 1 Man. & G. 155.

(*r*) See Williams *v.* Jones, 5 Barn. & C. 108.

6. **Liability of partners who defer the execution of articles.**—Where a partnership is contemplated to commence at a future day, notes given in the firm name for goods to be put in the stock in trade (which goods are received upon the individual credit of one who intends to become a member of such firm) may be collected against him even though the partnership is never actually formed. Stiles *v.* Meyer, 64 Barb. (N. Y.) 77; S. C., 7 Lans. 190; Bliss *v.* Swartz, 7 Lans. (N. Y.) 187.

A and B entered into partnership, and agreed that the partnership should have relation back to a time specified, and that the firm should be responsible for the debts contracted for goods by A in the intermediate time. *Held*, that the firm was liable for money appropriated to that purpose by A, during the time mentioned, which he held as treasurer of the county. Hutchinson *v.* Smith, 7 Paige (N. Y.) 26.

tribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him; (*s*) and the fact that the money or goods so supplied have been brought in by him as agreed will not render the firm liable. (*t*)

Upon this principle, apparently, it was held, in Wilson *v.* Whitehead, (*u*) that the author and publisher of a work were not liable for the paper supplied for it, the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor; and that the third should print and find the paper for the work, charging it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied; but it was held that they were not, for the printer was not authorized to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labor of his horses, and none of the others has any interest in them, though all share the profits. (*x*)

The propriety of the decision in this case has been doubted, (*y*) and it is not easily reconcilable with a similar case decided at *Nisi Prius*. (*z*) But the writer submits that upon principle Wilson *v.* Whitehead is perfectly correct, for *the publisher had no real authority to buy the paper on the author's credit, and no authority so to do ought to be implied in favor of a person who

*204]

(*s*) See Greenslade *v.* Dower, 7 Barn. & C. 635; Dickinson *v.* Valpy, 10 Barn. & C. 141, 142; Fisher *v.* Tayler, 2 Hare 229, 230; and the cases in the next note.

(*t*) Heap *v.* Dobson, 15 C. B. (N. S.) 460; Smith *v.* Craven, 1 Cromp. & J. 500.

(*u*) 10 Mees. & W. 503. See the observations of Wightman, J., on this case, in Kilshaw *v.* Jukes, 3 Best & S. 847.

(*x*) Barton *v.* Hanson, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, &c., supplied to his own horses.

(*y*) See per Wightman, J., in 3 Best & S. 871.

(*z*) Gardiner *v.* Childs, 8 Car. & P. 345.

knew nothing of the author or of any partnership or *quasi* partnership existing between him and the publisher.(*a*)

The two well-known cases of Saville *v.* Robertson(*b*) and Gouthwaite *v.* Duckworth(*c*) further illustrate the principle now in question. These cases closely resemble each other in many respects, for in each there was an agreement for a joint adventure in goods; in each an attempt was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure; and in each the defence was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his copartner. In Saville *v.* Robertson the defence was proved and prevailed, whilst in Gouthwaite *v.* Duckworth the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

In Saville *v.* Robertson(*d*) several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority, but no one was to have any share or proportion in the adventure except to the amount of the goods ordered and shipped by himself, and no adventurer was to be answerable for anything ordered or shipped by any co-adventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his co-adventurers were liable for them, on the ground that he and they were partners. But the court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his copartners were not liable to persons who supplied him with the means which enabled him to bring in such share.

*In Gouthwaite *v.* Duckworth(*e*) Browne and Powell, who were in partnership, were indebted to Duckworth, and [*205

(*a*) See Kilshaw *v.* Jukes, 3 Best & S. 847, and *ante* p. *31.

(*b*) 4 T. R. 720.

(*c*) 12 East 421.

(*d*) 4 T. R. 720. See, also, Hutton *v.* Bullock, L. R., 8 Q. B. 331, and 9 Id. 572; Kilshaw *v.* Jukes, 3 Best & S. 847.

(*e*) 12 East 421. Kilshaw *v.* Jukes, 3 Best & S. 847, was certainly very like this case, but was decided in accordance with Saville *v.* Robertson. See *ante* p. *31.

it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for and shipped by Browne & Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne & Powell. It was also agreed that in the event of a loss, Duckworth should share it. In consequence of this agreement, Browne bought goods for the adventure on credit, and it was held that all the three, viz., Browne, Powell and Duckworth, were liable to pay for them, for the goods were bought in pursuance of the agreement for *the adventure*, and although it was never intended that Duckworth should pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable.

There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom, for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on the ground of agency independently of partnership, there is not the same difficulty, for although the goods were to be paid for by Browne & Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth. It did not necessarily exclude the inference that as Browne & Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned. (*f*)[7]

(*f*) See Young *v.* Hunter, 4 Taunt. 582, the judgment of Gibbs, J.

7. Firm not liable for what a partner does before he joins it.—In Gouthwaite *v.* Duckworth (12 East 421, 425) Lord Ellenborough said: "It comes to the question whether, contemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, for the adventure; that was the agreement. Then what was the adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of Saville *v* Robertson does indeed approach very near to this. But the distinction between the cases is that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement

Liability of incoming partner.—As the firm is not liable for what is done by its members before the partnership between them commences, so, upon the very same principle, a person who is admitted

for the adventure, of which it has been before settled that Duckworth was to have a moiety. There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods, in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased, and, in consequence of that agreement, one of them go into the market and make the purchase, it is the same, for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them." Mr. Justice Bayley, in the same case, said: "In Saville *v.* Robertson, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship, in which they had a common concern, for the joint adventure; and, until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement."

A firm is not liable for the individual contracts or debts of one of its members; even its promise to fulfill such contracts must be founded on a new consideration, and the individual member must be released. Where two of the partners agree by express contract with the third to fulfill his engagement with a third person made before the formation of the partnership, such third person cannot sue the firm or such two persons after a breach of the contract, because the plaintiff is no party to such special agreement. Goodenow *v.* Jones, 75 Ill. 48.

An assignment for the benefit of creditors by a dissolved partnership, to one of the members of a new firm which succeeds to its business, does not render the new firm liable to the old one for the value of any of its assets, and the new firm cannot be garnished at the suit of any creditor of the old concern. Bancker *v.* Harrington, 30 La. Ann. 136.

A commercial partnership is not liable on the obligation contracted by one of the partners previous to the formation of the partnership, notwithstanding the fact that the partnership was to continue the same business in which the obligations were contracted, and that specified portions thereof were assumed by the individual members. Mosseau *v.* Thebens, 19 La. Ann. 516.

In an action on a note given by one partner, in the firm name, in part for goods sold to a former firm composed of different members, but carrying on the same business, it appeared that at an interview of an hour's duration plaintiff's account was presented and examined and the note executed therefor, in the presence of J. S., who was a member of both firms, but who did not join in the conversation and was not the financial partner of either firm. It further appeared that the account was made out to the new firm, while many of its items were due from the old firm, but no intentional deception on the part of the plaintiff was shown. *Held*, that the

as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner. Each partner is, it is true, the agent of the firm, *but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever, expressly or impliedly, authorized what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them.(g) But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed or adopted it, unless, at the time the act was done, it was done on his behalf.(h) Therefore, in Young v. Hunter,(i) where Hunter & Co. had ordered goods of the plaintiff for sale in the Baltic, and *afterwards* it was agreed between Hunter & Co. and Hoffham & Co. that the latter should join in the adventure, and share the profit and loss, it was held to be clear that Hoffham & Co. were not liable to the plaintiff to pay for the goods.

*206]

So, in Ex parte Jackson,(j) a person who was indebted by bond for money borrowed to carry on a trade took two other persons ostensibly into partnership. After two years, a joint commission of bankruptcy issued against the three, and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.[8]

evidence justified a finding by the jury of an assent by J. S. to the execution of the note. Shaw v. McGregary, 105 Mass. 96.

(g) See Horsley v. Bell, 1 Bro. C. C. 101, note, per Gould, J.

(h) Wilson v. Tumman, 6 Man. & G. 236.

(i) 4 Taunt. 582.

(j) 1 Ves. Jr. 131.

8. Liability of incoming partner.— A partner who enters a firm after it has made a contract to pay royalties for the use of a patent right, and as such enjoyed benefits thereunder, is liable, not on the express contract, but on an implied contract to pay for his enjoyment of benefits according to the terms enjoyed by the rest of the firm. Rogers v. Reissner, 30 Fed. Rep. 525.

An incoming partner is not liable for the previous debts of the concern, unless he makes himself so by express agreement, or by such conduct as will raise

Application of principle to promoters of companies.—Again, in Beale *v.* Mouls, (*k*) the members of a provisional committee of a company entered into a special agreement with the plaintiff for the

the presumption of a special promise. Ringo *v.* Wing (Ark.), 5 S. W. Rep. 787.

One partner transferred his interest to the other, who subsequently took a new partner. *Held*, such new firm could not be held liable, as survivors, for a debt of the old firm, in the absence of evidence that the new firm assumed payment of such debt. Dowling *v.* Clift, 23 N. Y. Week. Dig. 275.

Where the seller of goods to a firm agrees to deliver them at a future day, and prior to that time a new partner is admitted to the firm, and a note is given in the firm name for the goods when delivered, the new partner is liable even though the seller did not know, when he took the note, that a new member had entered the firm. Kearney *v.* Snodgrass, 12 Oreg. 311.

In Atkins *v.* Hunt (14 N. H. 205, 206), Gilchrist, J., said: "There is of course an essential difference between a mere proposition to form a partnership, and its actual constitution. Persons may take a deep interest in the objects to be accomplished by the company; may make donations to aid its progress; or may sign their names to subscription papers for the same end, without being liable for debts which other persons may contract in the prosecution of the same purpose. But a difficult question often arises as to where the proposition to make the contract ends, and the contract itself begins. In Bourne *v.* Freeth, 9 Barn. & C. 632, a prospectus was issued, stating the conditions upon which the company was formed; that the concern was to be divided into twenty shares, to be under the management of a committee, and ten per cent. of the subscriptions to be paid in by a certain date. It was held that this prospectus imported only that a company was to be formed, and not that it was actually formed, and that the signature to the prospectus did not indicate to any person who should read it that the signer had become a member of a company already formed. So, in a case where all the acts proved and relied on were equally consistent with the supposition of an intention on the part of the defendant to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership, it was held that he was not a partner. (Dickinson *v.* Valpy, 10 Barn. & C. 128, per Parke, J.) And where a prospectus for a company was issued, to be conducted pursuant to the terms of a deed to be drawn up, it was held that an application for shares, and payment of the first deposit, did not constitute one a partner who had not otherwise interfered in the concern. (Fox *v.* Clifton, 6 Bing. 776.) It was an important element in that decision that the deed was not executed by the defendant who was sought to be charged as a partner. In Howell *v.* Brodie, (6 Bing. N. C. 44), the defendant, from 1829 until 1833, advanced various sums, with a view to a partnership in a market about to be erected; knew that the money was applied towards the erection, and was consulted in every stage. In October, 1833,

(*k*) 10 Q. B. 976. See, too, Bremner *v.* Chamberlayne, 2 Car. & K. 569; Kerridge *v.* Hesse, 9 Car. & P. 200.

manufacture of a steam carriage. Afterwards, but before the contract was completed, the defendant Mouls became a member of the committee and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed, but the committee then refused to take it or to pay for it. In *an action brought against Mouls and the other members of the committee, it was held that Mouls was not liable. [*207 He was not liable on the special contract, for he was no party thereto, by himself or any agent, and he could not be made liable on any implied contract, for the existence of a special agreement excluded any implied contract relative to the same subject matter. It follows, from the principles on which this case was determined, that if the carriage had been accepted by the committee, Mouls would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which, *ex hypothesi*, he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided that if several members of a committee order goods, and then a new member joins the committee, he is not liable to pay for the goods, though they are delivered after he joined it. (*l*) [9]

it was settled by a written agreement that he should have a seventh share of it; but it was held that he was not liable as a partner until October, 1833, although profits had been made, but not accounted for to him, before that time. Lord Chief Justice Tindal mentions the fact that no account of profits was rendered previous to October, 1833, as being in favor of the defendant."

(*l*) Newton *v.* Belcher, 12 Q. B. 921; Whitehead *v.* Barron, 2 Moo. & R. 248. In Beech *v.* Eyre, 5 Man. & G. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

9. Application of principle to promoters of companies.—In Fox *v.* Clifton (6 Bing. 776), Lord Chief Justice Tindal said: "Upon this first question, therefore, whether a partnership was actually formed, we think, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of a partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made; inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further than that the defendants had offered to become partners in a projected concern, and that the con-

New contract.—Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made

cern proved abortive before the period at which the partnership was to commence; and therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants; for they began to act in the name of the whole before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors must rest upon the security of the directors who made such contract, and of those subscribers who, by executing the deed, have declared themselves partners, and of any who have, by their subsequent conduct, recognized and adopted the acts and contracts of the directors. But they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments. It is unnecessary to advert to any of the cases which have been referred to, each of which must rest upon its own peculiar circumstances, except that with respect to Perring *v.* Hone, decided in this court, we think it right to observe that the great point, whether there was a partnership or not, does not appear to have been made the prominent subject of argument, but to have been rather assumed than disputed; for the advertisement or prospectus was not brought to the attention of the court, nor is there any argument upon the terms of it. It is not incompatible with that determination that the court might have held the proof of partnership incomplete, if the same materials had been brought before them which are presented to us."

The general doctrine is well summed up by Mr. Collyer in his work on Partnership Law (book 5, c. 1, § 2, pp. 735–743), as follows: "In joint stock companies, more than in any other kind of partnership, a variety of acts are done before the partnership is actually commenced. Notices are published, prospectuses are distributed, meetings are held, officers are chosen, deposits are paid, and scrip receipts are given, long before the business is commenced or the deed of settlement is executed. Indeed, many of these acts are necessarily done before even the full complement of the intended shareholders is made up. Hence, although the prime movers and agitators of the scheme will undoubtedly be liable in respect of the contracts into which they enter for the purpose of launching the company; yet they cannot by such proceedings bind those who merely answer their invitation; those, for instance, who name themselves subscribers, and even pay deposits, and do other acts showing an intention of becoming partners, but who, by neglecting to observe the rules or to comply with the demands of the society, never become entitled to share the profits. The contract of partnership, as regards these passive subscribers, is executory only, and may be abandoned, if the terms of the partnership are not reasonably fulfilled by the projectors. Under such circumstances, they never have become actual partners in the concern, and consequently have never rendered themselves liable for its debts. In the language of a learned judge: 'If there is a contract to carry on business by way of present partnership between a certain definite number of persons, and the terms of that contract

after the introduction of a new partner. Dyke *v.* Brewer (*m*) illustrates the distinction alluded to. In that case the plaintiff agreed with A to supply him with bricks at so much per thousand, and the plaintiff began to supply them accordingly. B then entered into partnership with A, and the plaintiff continued to supply bricks as before. It was held that both A and B were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was that as A had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms, although if all the bricks delivered had been ordered by A in the first instance, he alone would have been liable to pay for them. (*n*)

*208] **Incoming partner taking debts on himself.*—If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind that even if an incoming partner agrees with his copartners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner. (*o*) In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue

are unconditional, or complete, then the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those contracts are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them.'"

(*m*) 2 Car. & K. 828.

(*n*) Helsby *v.* Mears, 5 Barn. & C. 504, is another case turning on the same principle as is explained by Lord Denman in Beale *v.* Mouls, 10 Q. B. 976.

(*o*) See per Parke, J., in Vere *v.* Ashby, 10 Barn. & C. 298; Ex parte Peele, 6 Ves. 602; Ex parte Williams, Buck 10.

of the new agreement, and not by reason of his having become a partner. [10]

Evidence of agreement to do so.—An agreement by an incoming

10. Incoming partner taking debts on himself—when liable.—Incoming partners may assume to themselves the debts of the concern with which they connect themselves; and this assumption may, both at law and in equity, either be proved by their express covenant or contract, or be inferred from the terms of it, or from the treatment of such debts by the firm, to the knowledge of the incoming partners, as the debts of the new firm. Updike *v.* Doyle, 7 R. I. 446.

Where an incoming partner adopts an executory contract made by the other partner, he becomes liable the same as if he had always been a member of the firm. Lucas *v.* Coulter, 104 Ind. 81.

Where a drawee of a bill of exchange, before its acceptance, enters into partnership with others, all agreeing that the goods for which the bill was given shall be used in the business and be paid for by the firm, and the drawee partner accepts the bill for the firm, such acceptance is binding on the partners. Markham *v.* Hazen, 48 Ga. 570.

Where a husband, being a partner, dies, and the wife succeeds him in the firm, it will be presumed that she becomes liable for his partnership debts, and a mortgage executed therefor is founded on a good consideration. Presser *v.* Henshaw, 49 Iowa 41.

While a special promise is necessary, yet an assumption by an incoming partner of the prior debts of the firm may be proved by very slight testimony. Cross *v.* Burlington Nat. Bank, 17 Kan. 336.

Where a party purchases an interest in a commercial house, entitling him "to an equal undivided one-third interest and ownership, and to all stock of merchandise, bills receivable, and debts in book accounts on hand, due or owing to the firm on a given day (over and above the payment of the liabilities of said firm)," he is responsible for the debts of the house existing at the time of purchase. Hughes *v.* Waldo, 14 La. Ann. 348.

Illustrations.—Goods were purchased by one person for which a promissory note was given. Afterwards he entered into partnership with another, and by consent of both partners, and of the holder of the note, the words "and company" were added to the signature of the maker, to make the note stand against the firm. *Held*, that the note was binding on the partnership. Crum *v.* Abbott, 2 McLean (U. S.) 233.

Defendant entered into partnership with a party who was indebted to plaintiffs. Defendant agreed with his partner to pay one-half of this indebtedness. *Held*, that, as an interest in the assets to which plaintiffs had a right to look for the satisfaction of their claims had been transferred to defendant, the latter's promise to his partner to pay one-half of plaintiffs' claims was a promise for plaintiffs' benefit, and inured by an equitable subrogation to plaintiffs, entitling them to sue defendant thereon. Ringo *v.* Wing (Ark.), 5 S. W. Rep. 787.

Where a retiring partner sold his interest in the firm to A, who undertook to be responsible for the firm's debts to the extent of the vendor's liability, and he became a member of the firm, and the new firm did pay some of the old firm's debts, and the assets which the retiring partner left were sufficient to pay all the firm's debts, it was held, in a suit

partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The courts, it has been said, lean

by the retiring partner, to compel an application of the firm's assets to the payment of the old firm's debts, that the undertaking by the new firm to pay the old firm's debts would be implied, but as no fraud was proved, that the complainant was only entitled to be repaid that which he had been compelled to pay as partner. Peyton *v.* Lewis, 12 B. Mon. (Ky.) 356.

F., by an agreement in writing, purchased the interest of S., in the firm of S. & O., and bound himself "to assume all the debts and liabilities of said S. in the late firm, and to save him harmless on account of all debts whatever of said firm." *Held*, that a creditor of the firm was entitled to be substituted to a personal judgment against F., on his agreement in favor of S., the latter consenting thereto. Francis *v.* Smith, 1 Duv. (Ky.) 121.

A, being a member of a firm, and having contributed to the stock of the company less than he had agreed on forming the partnership, sold out his interest to B, with the assent of the other partners, and was released by them from all liability to pay any of "the debts due by, or demands which might be brought against, said establishment." *Held*, that B, succeeding to the interest of A, took upon himself the liability of A to contribute to the other members of the firm. Cornwell *v.* Sandidge, 5 Dana (Ky.) 210.

Two consignees became partners for the transaction of commission business, and, circumstances tending to show that they turned their separate consignments into common stock, both were held liable for the proceeds. Dix *v.* Otis, 5 Pick. (Mass.) 38.

When not liable.—The general rule is that an incoming partner does not become liable for antecedent debts of the firm without an express undertaking to that effect upon a sufficient consideration. Meador *v.* Hughes, 14 Bush (Ky.) 652; Wright *v.* Brosseau, 73 Ill. 381; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Fagan *v.* Long, 30 Mo. 222; Stenburg *v.* Callanan, 14 Iowa 251.

The presumption is that an incoming partner is not liable for previously contracted debts. Kountz *v.* Holthouse, 85 Pa St. 235. The rule is that he is not so liable. Babcock *v.* Stewart, 58 Pa. St. 179; Deere *v.* Plant, 42 Mo. 60; Harp *v.* Tomlinson, 2 Vt. 103; Adkins *v.* Arthur, 33 Tex. 431; Atwood *v.* Lockhart, 4 McLean (U. S.) 350.

A copartner cannot make an incoming partner liable for the pre-existing debts by giving the note of the new firm therefor, but the debt may be novated with the consent of all parties. Fagan *v.* Long, 30 Mo. 322.

Where a partnership dissolves, a new firm composed entirely of a portion of the members of the old partnership cannot be sued jointly, in their firm name, for a debt of the dissolved firm. Shorter *v.* Highlower, 48 Ala. 526.

An incoming partner will not be liable for an old debt of the firm, unless there is a novation of the debt by a new promise by the entire new firm, upon a valid consideration, and a discharge of the old firm upon the old debt. Stenburg *v.* Callanan, 14 Iowa 251.

To warrant a suit by creditors against an incoming partner, upon a previous debt of the firm, there must be an agreement between him and the creditors

in favor of such an agreement, and are ready to infer it from slight circumstances; (*p*) and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm. (*q*) But this certainly is not enough, for the agreement to be proved is an agreement with the creditor, and of such an agreement an arrangement between the partners is of itself no evidence. (*r*)

As an instance where an incoming partner made himself liable

founded upon sufficient consideration. An agreement between him and his co-partners that he shall be liable does not give the creditors a right to sue. Morehead *v.* Wriston, 73 N. C. 398.

The rule that entries on the firm books bind the firm does not apply to the liability of a new partner for debts of the old firm charged to the new firm on its books, where he has not had access to the books so as to enable him to know what has been done. But his consent to be bound will be implied if he fails to object when he first has notice of such entries. Shoemaker Piano Mfg. Co. *v.* Bernard, 2 Lea (Tenn.) 358.

Illustrations.—Where T. bought the interest of H. in the firm of H. & W., and, with W., gave H. a bond of indemnity against all debts of the old firm, covenanting to pay them, the creditors of the old firm had no right of action against the new, upon the bond, for want of privity thereto. Hicks *v.* Wyatt, 23 Ark. 55.

A and B having been partners, C purchased the interest of A in the firm, agreeing to pay one-half of the partnership debts of A and B, and B and C then formed a partnership. *Held*, that the partnership debts of A and B did not become debts of the firm of B & C by the terms of the agreement between B and C. Hyer *v.* Norton, 26 Ind. 269.

Where the purchaser of a lot of mules upon credit, which were to be delivered to him at a future time, before their delivery formed a partnership with another person, with the agreement that the mules were to be put into the joint stock and sold on joint account, and they were so sold—*Held*, that the surety on the notes given by the purchaser for the mules, who had been compelled to pay the notes, could not hold the partner liable as a joint purchaser. Duncan *v.* Lewis, 1 Duv. (Ky.) 183.

Where a partnership between attorneys was dissolved after a suit begun, and a new partnership formed by one of the former partners and a new partner, which in turn was dissolved before the money in the suit was collected, an action for detaining the amount collected cannot be maintained against the new partner, the other alone having been attorney of record in that suit. Ayrault *v.* Chamberlin, 26 Barb. (N. Y.) 83.

(*p*) Ex parte Jackson, 1 Ves. Jr. 131; Ex parte Peele, 6 Ves. 602. See, also, Rolfe *v.* Flower, L. R., 1 P. C. 27.

(*q*) See Cooke's Bank. Law (8th ed.) 534, citing Ex parte Bingham and Re Staples; Ex parte Clowes, 2 Bro. C. C. 595.

(*r*) Ex parte Peele, 6 Ves. 602; Ex parte Parker, 2 Mont., D. & D. 511. See, also, Ex parte Freeman, Buck 471; Ex parte Fry, 1 Glyn & J. 96; Ex parte Williams, Buck 13.

for debts contracted by the firm before he joined it, reference may be made to Ex parte Whitmore. (*s*) In that *case Warwick and Clagett became partners. Warwick, who had had [*209 dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonored. On the bankruptcy of the firm it was held that the debt in question had become the joint debt of Warwick and Clagett, and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick. [11]

Bills by old partners for old debts a fraud on new partner.—Before leaving this subject it may be as well to observe that as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his copartners give a bill or note in their and his name for a debt contracted by them alone, this is *prima facie* a fraud upon him, and consequently he will not be liable to a holder with notice. (*t*)

Account stated in respect of old debt.—For similar reasons, an incoming partner will not, it is apprehended, be liable to pay a debt contracted before he became a partner, merely because his copartner has afterwards stated an account with the creditor and thereby admitted that the debt in question is due from the firm. (*u*) But, as will be seen hereafter, an incoming partner, unless he takes care, may find himself liable to pay the balance of an open running account commencing before he joined the firm and continued after-

(*s*) 3 Deac. 365. See, also, Rolfe *v.* Flower, L. R., 1 P. C. 27, which was a stronger case.

11. Evidence of agreement to be bound by debts of old firm.—A newly admitted partner only becomes liable for the debts of the firm by a special contract, and the burden of proof is on the persons who desire to establish such contract. Peters *v.* McWilliams, 78 Va. 567.

(*t*) See Shirreff *v.* Wilks, 1 East 48, *ante* p. *173.

(*u*) See, as to accounts stated, French *v.* French, 2 Man. & G. 644, and Lemere *v.* Elliott, 6 Hurlst. & N. 656.

wards, although payments have been made since he joined the firm sufficient to liquidate that part of the account for which he is directly responsible. (*x*)

*2. *Termination of liability.*

*210]

When a partner's liability ends.—Before examining the circumstances which put an end to a partner's liability to creditors of the firm, it is necessary to draw attention to the distinction between a partner's liability for what may be done after his copartners have ceased to be his agents and his liability for what may have been done whilst their agency continued. It is obvious that there may be many circumstances which have no effect upon a liability already accrued, but which, nevertheless, may prevent any liability for what is not yet done from arising; and in order to determine with accuracy the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

a. *Termination of liability as to future acts.*

A partner's agency ends by notice.—The agency of each partner in an ordinary firm, and his consequent power to bind the firm, *i. e.*, himself and his copartners, may be determined by notice at any time during the continuance of the partnership; (*y*) for his power to act for the firm is not a right attaching to him as partner independently of the will of his copartners, and although any stipulations amongst the partners themselves will not affect non-partners who have not notice of them, yet if any person has notice that one member of the firm is not authorized to act for it, that person cannot hold the firm liable for anything done in the teeth of such notice. (*z*)

With one or two exceptions, which will be mentioned presently,

(*x*) See Beale *v.* Caddick, 2 Hurlst. & N. 326, and Scott *v.* Beale, 6 Jur. (N. S.) 559, noticed *infra*, under the head of "Appropriations of Payments."

(*y*) See Vice *v.* Fleming, 1 You. & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quinn, 7 Price 193; Galway *v.* Mathew, 1 Camp. 402, and 10 East 264.

(*z*) This subject has been already discussed. See *ante* p. *170, *et seq.*

the agency of each partner and his consequent power to bind his copartners can only be effectually determined by giving notice of its revocation. The authority imputed to each partner must continue until some event happens to put an end to it, and this event ought to be as generally known as that which conferred the authority upon *him. The same reason which leads to the imputation of the power to act for the firm at all, demands [*211 that such power shall be imputed so long as it can be exercised and is not known to have been determined. (*a*) [12]

To this principle there are exceptions, which may be conveniently disposed of before the principle itself and its application are discussed.

1. *Effect of death.*—When a partner dies, notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his copartners

(*a*) As to the liability of an outgoing partner for the acts of his late partners and a new partner, see Scarf *v.* Jardine, 7 App. Cas. 345, noticed *ante* pp. *46, *197.

12. Partner's agency ends by notice.—Where a firm is formed for an indefinite time either partner may withdraw at his will, provided he does so without fraudulent purpose. Fletcher *v.* Reed, 131 Mass. 312.

Where a partner abandons the business and property of the firm, and writes to his copartners, refusing to join in a settlement of the partnership business, and telling them to settle as they please, and they form a new firm, and transfer the property of the old firm to the new, the dissolution will be complete. Blake *v.* Sweeting (Ill.), 12 N. E. Rep. 67.

A partnership is terminated by a positive refusal of one of the partners further to recognize it or to do anything under it. Ligare *v.* Peacock, 109 Ill. 94.

That one partner cannot, by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership or extricate himself from the responsibilities of a partner, either in respect to his associates or to third persons; but the partnership may be put an end to by the act of God, or by operation of law—*e. g.*, by death or bankruptcy, see Pearpoint *v.* Graham, 4 Wash. (U. S.) 232.

Where property was bailed to a partnership for no definite time, and the bailor could have removed it at his pleasure, one of the partners, upon retiring from the partnership, may give the bailor notice of his retiring and require him to remove the property, and absolve himself from any liability for loss of property occurring after his retirement. Winston *v.* Taylor, 28 Mo. 82.

One member of a firm gave notice to his copartner that the connection between them was dissolved, but this was not assented to by the copartner, and the parties did not afterwards act upon it. *Held*, that it did not operate a dissolution of the firm. Sanderson *v.* Milton Stage Co., 18 Vt. 107.

after his decease,(*b*) for, by the law of England, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not.(*c*)

The death of one partner does not, however, determine an authority given by the firm through him before his death, and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In Usher *v.* Dauncey(*d*) bills were drawn and endorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership, and not from the individual partner who had died.[13]

(*b*) Devaynes *v.* Noble, Houlton's case, 1 Mer. 616; Johne's Case, Id. 619; Brice's Case, Id. 620; Webster *v.* Webster, 3 Swanst. 490; See Vulliamy *v.* Noble, 3 Mer. 614; Brown *v.* Gordon, 16 Beav. 302, as to the power of surviving partners who are the executors of the deceased partner, to bind his estate.

(*c*) See Blades *v.* Free, 9 Barn. & C. 167; Smout *v.* Ilbery, 10 Mees. & W. 1; Campanari *v.* Woodburn, 15 C. B. 400.

(*d*) 4 Camp. 97.

13. **Effect of death or marriage to end liability.**—The death of a partner dissolves the partnership, unless there is an express stipulation to the contrary. Scholefield *v.* Eichelberger, 7 Pet. (U. S.) 586; Knapp *v.* McBride, 7 Ala. 19; Goodburn *v.* Stevens, 5 Gill (Md.) 1; Williamson *v.* Wilson, 1 Bland (Md.) 418; Ames *v.* Downing, 1 Bradf. (N. Y.) 321; Gratz *v.* Bayard, 11 Serg. & R. (Pa.) 41; Davis *v.* Christian, 15 Gratt. (Va.) 11. But the liability of a copartner, as well as his interest in the profits of a concern, may, by contract, be extended against and in favor of his estate, beyond his death. Scholefield *v.* Eichelberger, *supra*. S. P., Burwell *v.* Mandeville, 2 How. (U. S.) 560. And a court of equity may authorize the continuance of a partnership after the death of a partner, on behalf of infants. Powell *v.* North, 3 Ind. 392.

Contracts for the services of attorneys who are partners entitle the client to the service of each partner, and are determined by the death of either partner. McGill v. McGill, 2 Metc. (Ky.) 258.

Under a special contract to that effect, a commercial partnership will continue after the death of one of the partners, for the purpose of administration and liquidation, if not for all purposes. Powell *v.* Hopson, 13 La. Ann. 626.

So, also, a partnership is dissolved by a marriage of the two partners. Bassett *v.* Shepardson, 52 Mich. 3.

In Crawshay *v.* Maule (1 Swanst. 495, 509) Lord Eldon said: "The doctrine that death or notice ends a partnership has been called unreasonable. It is not necessary to examine that opinion; but much remains to be considered before it

Contribution after death.—Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his copartners since his death, his estate is not liable to contribute to such debts at the suit
*212] of the *surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his copartners, as will be seen hereafter when the subject of dissolution is under consideration. (e)[14]

2. *Effect of bankruptcy.*—When a firm becomes bankrupt, the authority of each member to act for the firm at once determines. If one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent copartners. At the same time, if, notwithstanding the bankruptcy of one partner, the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he

can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation, or assignment from his representative?"

(e) For instances where the estate of a deceased shareholder has been held liable to contribute to debts incurred since his decease, see Baird's Case, 5 Ch. 725; Blakeley's Executor's Case, 3 Macn. & G. 726; Hamer's Devisees' Case, 2 De G., M. & G. 366.

14. **Contribution after death.**—By the general rule of law, every partnership is dissolved by the death of one of the partners; but a partner may, by his will, provide that the partnership shall continue, notwithstanding his death, and if it be assented to by the surviving partner, it becomes obligatory. Burwell *v.* Mandeville, 2 How. (U. S.) 560.

On the decease of a partner, his interest in real estate, belonging to the partnership, descends to his heirs-at-law, subject to the debts of the partnership. Piatt *v.* Oliver, 3 McLean (U. S.) 27.

The estate of a deceased partner is liable for partnership debts, if the surviving partner be insolvent. Caldwell *v.* Stileman, 1 Rawle (Pa.) 212.

A partner dying, and leaving in his administrator's hands partnership and separate property, the partnership creditors and the separate creditors are to be paid *pari passu* from their respective funds, and then the balance of the separate property is to be equally divided among them *pro rata*. Bell *v.* Newman, 5 Serg. & R. (Pa.) 78.

and they were partners,(*f*) and although the estate of a bankrupt partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transactions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on "Bankruptcy," to which the reader is therefore referred.(*g*)[15]

3. *Effect of retirement of dormant partner.*—Another apparent, but not real, exception to the rule is that if a dormant partner, *i. e.*, one not known to be a partner,(*h*) retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given. But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application to his case. The following decisions illustrate

(*f*) See Lacy *v.* Woolcott, 2 Dowl. & R. 458.

(*g*) See Fox *v.* Hanbury, Cowp. 445; Morgan *v.* Marquis, 9 Ex. 145.

15. Effect of bankruptcy or insolvency.—The mere insolvency of a co-partnership is sufficient to defeat an attachment made by a creditor of one of the firm, although the partnership creditors have commenced no action for the recovery of their debts. Commercial Bank *v.* Wilkins, 9 Me. 28.

An assignment of partnership property for the benefit of creditors, which is void for want of conformity with statute requirements, will not work a dissolution of the partnership. Simmons *v.* Curtis, 41 Me. 373.

Simple insolvency, without stoppage of payment, or assignment, or any judicial process, does not work a dissolution of the partnership or divest the partners of their dominion over the partnership property. Siegel *v.* Chidsey, 28 Pa. St. 279; Arnold *v.* Brown, 24 Pick. (Mass.) 89.

The assignment of his property for the payment of his debts by one of the partners who has become insolvent, dissolves the partnership, and the other partner may settle up the partnership affairs. Odgen *v.* Arnot, 29 Hun (N. Y.) 146.

The bankruptcy of one partner dissolves the firm only so far as to prevent the making of new contracts and the incurring of new obligations, confining the firm to the completion of unfinished business necessary to the winding up of its affairs. The assignee in bankruptcy of such partner becomes a tenant in common with other partners, entitled to an accounting and to receive the bankrupt's share when the former business is settled. Such accounting may, at his option, include profits realized from new business carried down with the assets of the firm. King *v.* Leighton, 100 N. Y. 386.

(*h*) A dormant partner known to a few persons to be a partner is not dormant as to them; see the cases cited *infra*, note (*r*).

this exception: In Carter *v.* Whalley (*i*) the defendant Saunders was a partner in the "Plas Madoc Colliery Co.," but there was nothing to show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal, the company became indebted to *the plaintiff, and it was held that Saunders was not liable for the debt; because the name of the company gave no [*213 information as to the parties composing it, and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew.

In Heath *v.* Sansom (*k*) the defendants, Sansom and Evans, carried on business as partners under the style of Philip Sansom & Co., but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note on which he sued Sansom and Evans. The court decided that Evans was not liable, for when his right to share profits ceased he could not be held responsible for the subsequent acts of his copartner unless he authorized those acts or held himself out as still connected with him, and he had done neither. (*l*) [16]

Effect of lunacy.—With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic and his lunacy is not apparent or made

(*i*) 1 B. & Ad. 11.

(*k*) 4 B. & Ad. 172.

(*l*) See, too, Evans *v.* Drummond, 4 Esp. 89. This doctrine seems not to apply to Scotland. See Hay *v.* Mair, 3 Ross' Lead. Cas. on Com. Law. 639. The case of the Western Bank of Scotland *v.* Needell, 1 Fost. & F. 461, seems at first sight opposed to the authorities in the text, but it is conceived that in that case there must have been evidence to show that the defendant was known to the plaintiffs to have been a partner before he retired.

16. Effect of retirement of dormant partner.—Where a new partner is admitted into an existing firm doing business under a fixed firm name, in which no change is made, such new partner is to be deemed a dormant partner, unless his connection with the firm is, in some way, by publication or otherwise, made known to the public. Phillips *v.* Nash, 47 Ga. 218.

One who is a member of a partnership trading under the firm name of R. M. & Co., does not become a dormant partner, by reason of the creditor being ignorant of the name of the copartner of R. M. Deford *v.* Reynolds, 36 Pa. St. 325.

known, his power to bind the firm and his liability for the acts of his copartners (*m*) will remain unaffected.[17]

Effect of dissolution of which no notice is given.—So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although, as between the partners themselves, a dissolution or a retirement is a revocation of the authority of each to act for the others. (*n*) Thus, if a known

*214] partner *retires and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note. (*o*) And in determining which was first in point of time, viz., notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown. (*p*)[18]

(*m*) See Molton *v.* Camroux, 2 Ex. 487, and 4 Id. 17; and Baxter *v.* The Earl of Portsmouth, 5 Barn. & C. 170, and the cases cited *post*, book IV., ch. 1, § 2, to show that the lunacy of one partner does not dissolve the firm. See further on this subject, Story on Agency, § 481, and note there. See, also, Drew *v.* Nunn, 4 Q. B. D. 661.

17. Effect of lunacy.—An inquisition of lunacy, found against a member of a partnership, *ipso facto* dissolves the partnership. Isler *v.* Baker, 6 Humph. (Tenn.) 85.

(*n*) See Mulford *v.* Griffin, 1 Fost. & F. 145; Faldo *v.* Griffin, Id. 147, and the cases in the next note.

(*o*) See Parkin *v.* Carruthers, 3 Esp. 248; Williams *v.* Keats, 2 Stark. 290; Brown *v.* Leonard, 2 Chitty 120; Dolman *v.* Orchard, 2 Car. & P. 104, in which last three cases, however, there was a continual holding out. See, as to ordering such a bill to be delivered up, Ryan *v.* Mackmath, 3 Bro. C. C. 15.

(*p*) See Anderson *v.* Weston, 6 Bing. N. C. 296.

18. Effect of dissolution of which no notice is given.—The general rule is that where no notice of dissolution is given, the persons who composed the firm continue liable to creditors who were ignorant of the change in the firm. The following cases fully illustrate this principle: Amidown *v.* Osgood, 24 Vt. 278; Bradley *v.* Camp, Kirby (Conn.) 77; Benjamin *v.* Covert, 2 N. W. Rep. (N. S.) 625; Buffalo City Bank *v.* Howard, 35 N. Y. 500; Bernard *v.* Torrance, 5 Gill & J. (Md.) 383; Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321; Grady *v.* Robinson, 28 Ala. 289; Heroy *v.* Van Pelt, 4 Bosw. (N. Y.) 60; Hunt *v.* Hall, 8 Ind. 215; Howell *v.* Adams, 68 N. Y. 314; Kennedy *v.* Bohannon, 11 B. Mon. (Ky.) 118; Ketcham *v.* Clarke, 6 Johns. (N. Y.) 144; Lamb *v.* Singleton, 2 Brev. (S. C.) 490; Merritt *v.* Pollys, 16 B. Mon. (Ky.) 355; Newcomet *v.* Brotzman, 69 Pa. St. 185; Princeton, &c.,

Torts after dissolution.—A partner who retires and does not give sufficient notice, exposes himself to the risk of being sued for torts

Turnpike Co. *v.* Gulick, 1 Harr. (N. J.) 161; Price *v.* Towset, 3 Litt. (Ky.) 423; Schurten *v.* Davis, 21 La. Ann. 173; Southern *v.* Grim, 67 Ill. 106; Spears *v.* Toland, 1 A. K. Marsh. (Ky.) 203; Southwick *v.* McGovern, 28 Iowa 533; Tabb *v.* Gist, 1 Brock. (U. S.) 33; Thurston *v.* Perkins, 7 Mo. 29. See, also, Woodruff *v.* King, 47 Wis. 261.

To establish the liability as partners of defendants who have dissolved partnership, it must appear: 1, that the plaintiff, at the time the contract was made under which his account accrued, knew that the defendants had been in partnership; 2, that he was ignorant of their dissolution; and 3, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability. Pratt *v.* Page, 32 Vt. 13; Benton *v.* Chamberlain, 23 Vt. 711.

Its scope and extent.—Where, after dissolution, one of the partners gives a note in the individual names of both, for goods sold to him on the credit of the firm, the note binds both partners if the seller of the goods did not know of the dissolution. Iddings *v.* Pierson, 100 Ind. 418.

Where one of three partners retires from or a new partner comes into the firm, or both, and notice thereof is given, but the business continues to be carried on in other respects as before, those partners as to whom no notice was given will be presumed to hold the same relation to the concern afterwards that they did before. Howe *v.* Thayer, 17 Pick. (Mass.) 91.

Where notice of dissolution has not been published in a newspaper, or brought home to the knowledge of the party to be affected by it, evidence of the mere notoriety of the dissolution is not admissible to prove such notice. Pitcher *v.* Barrows, 17 Pick. (Mass.) 361.

Where it is material to know the exact time of dissolution, evidence that one had notice of such dissolution at a certain time is not admissible. Shaffer *v.* Snyder, 7 Serg. & R. (Pa.) 503.

Notice of dissolution may be shown either by direct or circumstantial evidence, sufficient to establish the fact that the person seeking to enforce the partnership liability knew of the dissolution. Laird *v.* Ivens, 45 Tex. 622. See, also, Lovejoy *v.* Spafford, 93 U. S. 430; Coddington *v.* Hunt, 6 Hill (N. Y.) 595; Mauldin *v.* Branch Bank, 2 Ala. 502.

Want of notice of a dissolution will charge the firm on a subsequent accommodation endorsement, the holder having had previous dealings with the firm, in the same manner as if the firm continued to exist. Dundass *v.* Gallagher, 4 Pa. St. 205.

Its limits and exceptions.—A person who takes a partnership note, knowing that the partnership articles provide for its dissolution in case of the withdrawal of the capital, is put upon inquiry as to whether such dissolution has taken place. Smith *v.* Vanderburg, 46 Ill. 34.

The principle that after a partnership is dissolved, one partner, dealing with a person who has no notice of the dissolution, may bind his copartner, applies only to transactions in the usual course of business. Whitman *v.* Leonard, 3 Pick. (Mass.) 177.

A member of a firm who retired therefrom without publishing notice of the dissolution, is not liable on a note signed

committed subsequently to his retirement by his late copartners or their agents; and in the absence of proof of the true state of things he would be held liable for them. (*q*)

in the firm name by another member, and given to a new customer eleven years after the retirement. Farmers', &c., Bank *v.* Green, 1 Vr. (N. J.) 316.

A contract by a customer of a partnership, with one of the partners, on account of the firm, after a dissolution, but without notice of the dissolution, will not bind the firm, unless, by the avoidance of the contract, the customer would suffer a loss, or be put in a worse situation than he would have been in had he been advised of the dissolution before making the contract. Brisban *v.* Boyd, 4 Paige (N. Y.) 17.

Notice of dissolution is necessary where the outgoing partner holds himself out as the representative of the firm, but not where he acts exclusively for himself. Taylor *v.* Young, 3 Watts (Pa.) 339.

One who has notice, at the beginning of a partnership, of the period at which it will expire, cannot charge the firm with goods sold to its agent after that period. In such a case the dissolution is a revocation of the agent's authority. Schalter *v.* Winpenny, 75 Pa. St. 321.

Various illustrations of the foregoing principles.—A party, after his withdrawal from a firm, suffered his name to appear in the firm name for some time after his withdrawal, and his name appeared before his withdrawal in the business card of the firm, published in a newspaper, to which he was a subscriber. It appeared he had admitted that he still had an interest in the firm, and that his name was used as before, and that he was liable to the same extent he had been. He continued for more than a year after his withdrawal at his place in the firm. No notice of dissolution was given. *Held*, that from these facts the jury were fully warranted in finding him liable as a member of the firm. Ellis *v.* Bronson, 40 Ill. 455.

Two partners in a mill and cotton factory, in a small town, dissolved their partnership, and posted up written notices of the dissolution in four or five places in the town. Soon after, one of the partners gave a note in the name of the firm, to a bank in a town twelve miles distant. *Held*, that the court could not say that the notice was sufficient, nor disturb a verdict for the bank, which implied a finding that it was insufficient, as being contrary to evidence. Mitchum *v.* Bank of Kentucky, 9 Dana (Ky.) 166.

Where a note was signed by one of the members of a commercial firm, with the addition of the words "in liquidation," it was held that such a note was a notice to the payee that the firm was dissolved, and that, without a special authorization to the partner signing the note from his copartner, the note was not binding on him. Speake *v.* Barrett, 13 La. Ann. 479.

Plaintiff sued defendants, as copartners, upon an account for work and labor. It appeared that defendants were in part-

(*q*) Stables *v.* Eley, 1 Car. & P. 614. In this case such proof was given, and the defendant was nevertheless held liable, on the ground of holding out. This, however, was a wrong application of that doctrine. See *ante* p. *47, and Pollock Dig. (3d ed.) 25.

Case of dormant partner.—Moreover, if a dormant partner is known to certain individuals to have been a partner, he is, as to them, no longer in the situation of a dormant partner, and must

nership till within a short time of plaintiff's engagement; that at the time of such engagement the defendant, who appeared and defended the action, showed him his work; that the tools and apparatus of the partnership remained unchanged; that the business was still carried on in the partnership name; and that nothing was done, until after plaintiff had rendered his services, to notify third persons that the partnership was dissolved. *Held*, sufficient to support a finding of a continuance of the partnership as to third persons. Reid *v.* Frazer (Minn.), 35 N. W. Rep. 269.

After the dissolution of a firm, and an assignment of its property, a debtor settled with one of the partners, without actual notice of the assignment. *Held*, that the settlement was binding on the assignee, because one partner has authority to settle firm debts, after dissolution, in the absence of an agreement to the contrary known to the debtor, and because the dissolution was not sufficient to put the debtor on inquiry as to whether there was any such agreement or any assignment. Huntington *v.* Potter, 32 Barb. (N. Y.) 300.

A brought an action as endorsee on a note made in October, 1836, in renewal of a note made in July, 1834, by the firm of B & C. B had formed a partnership with D in January, 1834, but the new firm retained the books of B & C, and collected their debts. *Held*, that the liability of a member of the firm to pay the note depended on their partnership when the first note was given; that to show their dissolution, so as to take away B's rights, some notice to B must be clearly proven; that the fact of forming a new connection when the new firm occupied the old store, and used the old firm's books and collected their debts, was not sufficient evidence of a dissolution, as the old firm might have been continued for the purpose of settling its affairs. Brown *v.* Clark, 14 Pa. St. 469.

A firm doing business in A was dissolved, but no notice of the dissolution was published in a newspaper. About the time of the dissolution, B, a member of the firm, gave a note in the name of the firm to a bank at C, which note was, after the dissolution, renewed by an agent acting under a sealed power of attorney given by B in the name of the firm. *Held*, that the notice of the dissolution was insufficient, so far as the bank at C was concerned; that the firm were liable on the note, whether given before or after the dissolution; that, if the renewal was void, the bank had the right to recover on the original note, which it had retained; that an assignee of the firm, for the payment of the debts thereof, had properly paid this debt to the bank, although he, the assignee, may have had the requisite notice of the dissolution, and that the debt was contracted afterwards. Hammond *v.* Aiken, 3 Rich. (S C.) Eq. 119.

A, a stage proprietor, engaged B to board a person in A's employment. Afterwards A sold half his interest in the stage property to C, and A and C became partners. The person so in the employment of A continued in the employment of the partners, and continued to board with B; but no notice was given to B of the terms of said partnership, nor was B informed by A that he should not pay such person's board after the

therefore give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners. (*r*) [19]

formation of said partnership. *Held*, that B might recover against A after the formation of the partnership as well as before. Taggart *v.* Phelps, 10 Vt. 318.

Where the plaintiffs, who were lawyers, drew a writ in favor of three persons, who had been partners, describing one of them as late partner of a certain firm, it was held that this was sufficient proof that the plaintiffs, at the time of the drawing of the writ, knew that the one described as late partner had ceased to be a member of the firm. Cahoon *v.* Hobart, 38 Vt. 244.

A partnership in Mobile, Ala., was broken up by violence, which was notorious, and public notice of the dissolution was given. The following year one of the partners set up business under the same firm name, which indicated by name only himself, in Milwaukee, and dealt with persons in New York who had formerly dealt with the old firm in Mobile; upon one of his notes these New York dealers strove to hold his former partners in Mobile liable. *Held*, that the circumstances of the case were such as to put the New York dealers upon their inquiry, and that they could not be allowed to hold the defendant. Clapp *v.* Upson, 12 Wis. 492.

In an action upon a partnership note, it was shown that the partnership was dissolved prior to the execution of the note, but that no notice of such dissolution was given to the payee. *Held*, that in the absence of such notice, all the members of the firm were chargeable, notwithstanding the dissolution. Clement *v.* Clement (Wis.), 35 N. W. Rep. 17.

(*r*) Farrar *v.* Defline, 1 Car. & K. 580. See, too, Evans *v.* Drummond, 4 Esp. 89, and Carter *v.* Whalley, 1 B. & Ad. 14.

19. **Should dormant partner give notice of dissolution?**—A dormant partner is not bound to give notice of dissolution. Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416; Magill *v.* Merrie, 5 B. Mon. (Ky.) 168; Deford *v.* Reynolds, 36 Pa. St. 325. But see Park *v.* Wooten, 35 Ala. 242.

A retiring dormant partner owes a duty to those who before his retirement had some knowledge of his connection with the firm, to give them notice of dissolution; but he owes no such duty to strangers who are ignorant of his connection with the firm. Nusstaumer *v.* Backer, 87 Ill. 281; Cregler *v.* Durham, 9 Ind. 375; Warren *v.* Ball, 37 Ill. 76.

A partner who was known to be a member of the firm, upon retiring from the firm, must publish notice of such retirement, in some newspaper where advertisements are inserted, and published in the place where the business is done, in order to shield himself from liability for the future debts of the firm, to those even with whom they had no previous dealings. Simonds *v.* Strong, 24 Vt. 642; Martin *v.* Searles, 28 Conn. 43.

A partner whose name has not appeared in the firm will be liable to persons dealing with the partnership after his retirement from it, if he was known to such persons as a member of the firm, either by direct transactions or public notoriety, and they have not been notified of the dissolution of the connection. Davis *v.* Allen, 3 N. Y. 168.

Defendant Newton was a silent part-

Importance of notifying dissolution.—It is obvious, therefore, that on the dissolution of a firm or the retirement of a partner it is of the greatest importance to notify the fact, and each partner has a right to notify it.[20]

ner of the other two defendants, who were ostensible partners. September 15th, 1882, a ninety days' note, bearing the firm name, was given to the plaintiff for $1500. The firm name was composed of the names of the two ostensible partners. October 2d, 1882, defendant Newton retired from the firm, and another silent partner took his place, but no notice of the change was given, and the firm name remained the same. December 16th the note was taken up, marked "Paid" by plaintiff's cashier, and a new note given therefor, bearing the firm name. The cashier testified that the new note was received in payment of the old one. *Held*, in the absence of evidence of an agreement that the new note should be accepted in payment of the old one, the members of the original firm were liable for the debt. First Nat. Bank *v.* Newton (Colo.), 14 Pac. Rep. 428.

Where two were concerned together in business, but the business was done in the name of one, and it was not generally known that they were partners—*Held*, that the other was a dormant partner, and therefore not liable, to a person who did not know of the existence of the partnership, for a debt contracted by his partner after the dissolution, though no notice had been given. Kelley *v.* Hurlburt, 5 Cow. (N. Y.) 534.

B. having been a dormant partner with T., under the style of "The Atlantic Forge Company," the firm was dissolved, and a new firm was formed by T. with a third person, under a different name, to conduct the same business, at the same place; and the new firm sent notice by mail to all persons who had transacted business with the old firm. A person who had never dealt with the old firm, sold goods nominally to T., and took the note of the new firm therefor. The jury found that the dissolution and formation of the new firm were matters of public notoriety. *Held*, that the retiring partner was not liable for the goods so sold, although the vendor, at the time of the sale, supposed him still to be a partner. Holdane *v.* Butterworth, 5 Bosw. (N. Y.) 1.

20. **Importance of notice of dissolution.**—The acts of either partner, notwithstanding dissolution, will continue to be obligatory upon the others until due notice of dissolution is given. Price *v.* Towsey, 3 Litt. (Ky.) 423; Ketcham *v.* Clarke, 6 Johns. (N. Y.) 144; Merritt *v.* Pollys, 16 B. Mon. (Ky.) 355.

A partnership once formed is considered as continuing, as to third persons, until notice of its dissolution. Thurston *v.* Perkins, 7 Mo. 29; Princeton, &c., Turnpike Co. *v.* Gulick, 1 Harr. (N. J.) 161; Bernard *v.* Torrance, 5 Gill & J. (Md.) 383.

All the partners may be bound, after the dissolution of the partnership, by a contract made by one partner in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. Hunt *v.* Hall, 8 Ind. 215.

Where there has been no notice of dissolution and one partner gives the firm note to one who has no knowledge

Each partner has a right to notify it.—If his copartners prevent him from exercising that right, they will be compelled to do what may be necessary to enable notice to be given, *e. g.*, to sign advertisements for publication in the "Gazette." (*s*)

**Effect of notice of dissolution.*—Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification; (*t*) nor is he liable on bills or notes subsequently drawn, accepted or endorsed by any of them in the name of the late firm, (*u*) even although they may have been dated before the dissolution, (*x*) or have been given for a debt previously owing from the firm (*y*) by the partner expressly authorized to get in and discharge its debts. (*z*) [21] [*215

thereof, the note binds the firm. Ewing *v.* Trippe, 73 Ga. 776; Holt *v.* Simmons, 16 Mo. App. 97.

To avoid future liability, the retiring partner must give notice of his retirement. Strecher *v.* Conn, 90 Ind. 469.

Partners in trade who continue to do business in the name of the firm, and are ostensibly jointly concerned, are bound by the contracts of either, though a private article of dissolution may have been entered into between them. Spears *v.* Toland, 1 A. K. Marsh. (Ky.) 203.

The fact that sufficient time to give public notice had not elapsed between the dissolution of a firm and the subsequent making of a note by one of the late partners, will not excuse the partners from their liability to pay such note in the hands of a *bona fide* holder. Bristol *v.* Sprague, 8 Wend. (N. Y.) 423.

(*s*) Hendry *v.* Turner, 32 Ch. D. 355; Troughton *v.* Hunter, 18 Beav. 470.

(*t*) Minnitt *v.* Whinery, 5 Bro. P. C. 489.

(*u*) Paterson *v.* Zachariah, 1 Stark. 71; Abel *v* Sutton, 3 Esp. 108; Spenceley *v.* Greenwood, 1 Fost. & F. 297.

(*x*) Wrightson *v.* Pullan, 1 Stark. 375; S. C., Wright *v.* Pulham, 2 Chitty 121.

(*y*) Kilgour *v.* Finlyson, 1 H. Bl. 156; Dolman *v.* Orchard, 2 Car. & P. 104.

(*z*) Kilgour *v.* Finlyson, 1 H. Bl. 156. See Lewis *v.* Reilly, *infra*, note (*c*).

21. **Effect of notice of dissolution.**—The general rule is that after dissolution neither partner can make a new contract or incur new responsibilities in the firm name which will be binding on the others without express authority; and no note, draft or acceptance so executed in the firm name will be valid, if the party with whom the contract is made had notice of the dissolution.

Cases in which notice is immaterial.—There are, it is true, cases to be met with in which, notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those

Curry *v.* White, 51 Cal. 530; Brown *v.* Broach, 52 Miss. 536; Maxey *v.* Strong, 53 Miss. 280; Smith *v.* Shelden, 35 Mich. 42; Floyd *v.* Miller, 61 Ind. 225; Bacon *v.* Hutchings, 5 Bush (Ky.) 595; Montague *v.* Reakert, 6 Id. 393; Gale *v.* Miller, 1 Lans. (N. Y.) 451; Whitworth *v.* Ballard, 56 Ind. 279; Meyer *v.* Atkins, 29 La. Ann. 586; Vaccaro *v.* Toof, 9 Heisk. (Tenn.) 194.

A declaration, alleging that a note was made in the name of the firm by one of the partners after a dissolution, except for the purpose of settlement, and given for a pre-existing debt of the firm, does not show a partnership liability, but does show the liability of the partner making the note in his separate capacity. Fontaine *v.* Lee, 6 Ala. 889.

The notice of dissolution, and that one of the members would thereafter conduct the business, is evidence of the facts therein contained, and admissible on the question in whose possession the firm property remained after the dissolution. Kelly *v.* Murphy (Cal.), 12 Pac. Rep. 467.

Where the facts are ascertained, it is a question of law whether notice of dissolution is reasonable or not. Mowatt *v.* Howland, 3 Day (Conn.) 353.

It is not sufficient proof of authority in one partner to execute a firm note, after dissolution, to show that the other partners have paid certain other notes so executed by him in the firm name. But parol authority to one partner who used the firm name after dissolution is sufficient; written authority is not required. Easter *v.* Farmers' Nat. Bank, 57 Ill. 215.

A bill of exchange drawn by a partnership and sent to an agent for sale, but sold after notice to the agent and the purchaser that one partner has retired, binds the remaining partner only. Robb *v.* Mudge, 14 Gray (Mass.) 534.

That a partner, after dissolution of the firm, with notice to its creditors, cannot renew a partnership note of his late partnership, see Moore *v.* Lackman, 52 Mo. 323; Haddock *v.* Crocheron, 32 Tex. 276. But compare Taylor *v.* Hill, 36 Md. 494.

The rule that after dissolution one partner cannot, by transferring a check previously signed, create a liability against the firm, applied where one partner drew a check in the name of his firm, retained it in his possession, and, after the dissolution, transferred it to a creditor in payment of his private debt. Gale *v.* Mitler, 54 N. Y. 536.

After dissolution, a note made in the firm name, with the assent of the partners, for a debt due by the firm, is a valid obligation. The debt due by the firm, particularly when an extension of time of payment is secured by giving the note, is a sufficient consideration therefor. Randolph *v.* Peck, 1 Hun (N. Y.) 138.

Without express authority from the other members of the firm, no partner other than the liquidating partner may, after dissolution, borrow money to pay a firm debt and give a note therefor. McCowin *v.* Cubbinson, 72 Pa. St. 358. In other cases a ratification with knowledge of the facts must be shown. McElroy *v.* Melear, 7 Coldw. (Tenn.) 140.

Illustrations.—Where one of the surviving members of a partnership answered under oath to a suit upon a due-

who were members thereof prior to the dissolution, but in each of these cases there was some circumstance taking it out of the ordinary rule. In Burton *v.* Issitt (*a*) the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorize the giving of a promissory note for sixpences, payable under the Lords' act, and the retired partner was therefore held bound by a note given by his late partner in payment of those sixpences. In Smith *v.* Winter (*b*) the continuing partner had express permission to use the name of his late partner, who was therefore justly held liable on a bill given in the name of the old firm after his retire-

*216] ment. The only case, *indeed, of this description which presents any difficulty, is Lewis *v.* Reilly. (*c*) There, two partners drew a bill payable to their own order, and afterwards dissolved partnership. One of them then endorsed the bill in the name of both to the plaintiff, who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled

bill signed in the firm name, denying its execution and the existence of such a firm, a reply that after its execution he ratified the act of his partner in signing it, was held to be good on demurrer. Pattison *v.* Norris, 29 Ind. 165.

Where one of two copartners, after dissolution, gave a note in the name of the firm for his own private debt, the creditor knowing that the partnership was dissolved; and this note being afterwards sued, and the party who made it having become bankrupt, the other partner compromised the suit by giving his own note for half the debt and all the costs, part of which note he afterwards voluntarily paid; it was held that the making and acceptance of the first note was a fraud upon the absent partner, and that the second note was therefore void. Stearns *v.* Burnham, 4 Me. 84.

Where a partner, after the partnership had been dissolved by the absconding of his copartner, gave a note in the name of the firm, payable on demand, in lieu of a note given by the firm which had not become payable, with a view to enable the creditor to secure his debt by an attachment of property; it was held that the other partner was not bound by the transaction, because the giving of the new note was not in the usual course of dealing, and that the attachment was void as to other creditors. Whitman *v.* Leonard, 3 Pick. (Mass.) 177.

The name of a firm was changed from "Davis Creamery" to "Beloit Creamery." *Held*, not to import notice that D. J. Davis had retired from the firm, even though aided by the fact that before the change checks were signed "Davis Creamery, by W. J. Davis," while after the change they were signed simply "W. J. Davis." Coggswell *v.* Davis, 65 Wis. 191.

(*a*) 5 B. & A. 267.

(*b*) 4 Mees. & W. 454.

(*c*) 1 Q. B. 349.

to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The court seems to have proceeded on the supposition that an endorsement by one of several payees in the name of all is sufficient; but the writer has been unable to find any previous authority for such a doctrine, save where the endorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration. (*d*) [22]

Exceptions to rule.—The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice, are—

When a partner continues to hold himself out.—First, where a partner who has retired and notified his retirement, nevertheless continues to hold himself out as a partner; and secondly, where what is done only carries out what was begun before.

(*d*) See Story on Bills, § 197, and Abel *v.* Sutton, 3 Esp. 108. The cases go further than is suggested in Garland *v.* Jacomb, L R., 8 Ex. 220, for the notice of dissolution is what creates the difficulty. See *infra*, p. *220, note (*s*).

22. **Cases in which notice is immaterial.**—If one partner contracts with a third person, in the name of the firm, after dissolution, but that fact is not made public or known by such third person, the law considers the contract as being made with the firm, and upon their credit. But if the partner deal with another in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other to know that the partnership was dissolved, since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was contracting, and upon his credit. Le Roy *v.* Johnson, 2 Pet. (U. S.) 186.

The heirs of a deceased partner are not bound by the rigid rules as to notice of dissolution of the partnership, applicable to the withdrawal of a partner from the firm, who would still be liable if he permitted his name to remain in the partnership. Williams *v.* Mathews, 14 La. Ann. 11.

Persons having no knowledge of a partnership are not entitled to notice of its dissolution. Chamberlin *v.* Dow, 10 Mich. 319.

Entries in the firm books in the nature of admissions of indebtedness on the part of the firm are not binding upon one who retired from the firm before they were made, whether the creditor knew of his retirement or not. Pringle *v.* Leverich, 97 N. Y. 181; S. C., 49 Am. Rep. 522.

Circumstances such as leave no rational doubt on the mind that one knew of the dissolution of a partnership are as satisfactory as direct and positive proof. Irby *v.* Vining, 2 McCord (S. C.) 379.

1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in an earlier part of this treatise. In Williams *v.* Keats, (*e*) after a partner had retired and after notice thereof had been given by advertisement, a bill was accepted by his copartner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement, for there was no evidence to show *that the plaintiff in fact knew of the dissolution. (*f*) [23] [*217

Effect of not preventing use of name.—Upon this, however, it is to be observed that the only evidence that the retired partner authorized the continued use of his name was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires and notice of his retirement is given by advertisement, he will not continue to incur liability by the acts of his copartners simply because they continue to carry on business in the old name and he does not take steps to stop them. (*g*) His forbearance in this respect does not necessarily amount to an authority to use his name as before, and unless his name is used by his authority he is not liable on the ground that he holds himself out as a partner. (*h*) But although it may be doubtful whether in Williams *v.*

(*e*) 2 Stark. 290. See, too, Dolman *v.* Orchard, 2 Car. & P. 104; Emmet *v.* Butler, 7 Taunt. 600.

(*f*) See, as to this, Brown *v.* Leonard, 2 Chitty 120, *infra*.

23. Holding out after notice of dissolution.—Where a firm is sued, it may be shown in evidence that after the withdrawal of a partner and a change in the firm name, the partnership had remained practically the same, and that the business had been conducted by the same persons as before such withdrawal and change of name. Mellinger *v.* Parsons, 51 Iowa 58.

Two surviving partners published notice "that the business of the late firm will for the present be carried on in the same name, under the charge of J. H." (one of the partners), "who will continue, and who is duly authorized to adjust and settle matters relative to the same." *Held*, that the surviving partners held out to the world that they would continue to transact business under that name, and that a note given by J. H. in the name of the firm was binding upon both. Casco Bank *v.* Hills, 16 Me. 155.

(*g*) See Newsome *v.* Coles, 2 Camp. 617.

(*h*) As to a retiring partner's right to

Keats there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated, and, therefore, he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in Brown *v.* Leonard, (*i*) in which the plaintiff sued on a promissory note made in the name of Spring, Leonard & Bush. Before the note was made, Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard and Spring, but that his name was to continue for a certain time. Bush was held liable on the note; for, notwithstanding his retirement, his name was continued, and with it his responsibility. (*k*) [24]

an injunction to restrain the continuing partners from carrying on business in the old name, see De Tastet *v.* Bordenave, Jac. 516; Webster *v.* Webster, 3 Swanst. 490, note; Lewis *v.* Langdon, 7 Sim. 421.

(*i*) 2 Chitty 120.

(*k*) Bush, however, seems to have undertaken that the notes should be provided for. See the judgment.

24. **Effect of not preventing use of firm name.**—A retiring partner, who gives notice by publication in a newspaper that he has ceased to be a partner, but who after that allows his name to appear in the firm as a partner, and continues in its employment, is liable as a partner to one who deals with the firm, and is misled by the appearances, and has no notice that he is not a partner, although the fact is generally known at the place where the contract is made. Wait *v.* Brewster, 31 Vt. 516.

When a retiring partner consents to the continued use of the firm name, he cannot deny his liability to one who gives credit to the firm in ignorance of the change, even though such creditor had no transactions with the firm until after the change. Richards *v.* Hunt, 65 Ga. 342; Richards *v.* Butler, Id. 593.

Creditors of a partnership need not pay any attention to public rumors of dissolution where the use of the firm name and credit is continued. Moline Wagon Co. *v.* Rummell, 2 McCrary (U. S.) 307.

No liability can be created on the credit of a firm which has been dissolved, unless the firm name is used in making purchases. Kirby *v.* Hewitt, 26 Barb. (N. Y.) 607.

Where, after the retirement of a partner, his name is continued in the style of the firm with his sanction and approval, he remains liable on the contracts and for the debts of the firm to the same extent as if he had actually continued a partner therein. Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132. See, also, Ellis *v.* Bronson, 40 Ill. 455; Speer *v.* Bishop, 24 Ohio St. 598. Compare Van Doren *v.* Horton, 19 Hun (N. Y.) 7.

The mere fact that a partnership name has been kept over the door after the dissolution of the partnership, is not of

2. *Agency continuing for purposes of winding up.*—It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business. (*l*) This doctrine requires consideration. *No doubt after, as well as before dissolution, each partner can pay or receive payment of a partnership debt; for it is clearly settled that payment by one of several joint debtors, or to one of several joint creditors, (*m*) extinguishes the debt irrespectively of any question of partnership. So, again, as regards dealing with the partnership assets, it has been held that the power of a continuing or surviving partner to sell or pledge partnership assets is as extensive as that of a partner in a going concern. (*n*) But when questions of a different sort arise, considerable difficulty is experienced, and this difficulty is rather increased than diminished by the loose statement that a partnership which is dissolved is nevertheless deemed to continue so far as may be necessary for winding up its affairs. 25

*218]

itself sufficient to authorize one who holds a note signed in the partnership name to recover upon it. Boyd *v.* McCann, 10 Md. 118.

The fact that A permits the firm to use his name as their firm name does not authorize the firm, upon its dissolution, to confer such right upon the new firm. Horton Manufacturing Co. *v.* H. M. Co., 18 Fed. Rep. 816.

A copartnership was incorporated, and transferred their property to the corporation, and, by a by-law, the business was to be carried on in the name of the copartnership. *Held*, that though the partnership was thus dissolved the members were liable as partners upon contracts subsequently made with third persons having no notice of the dissolution. Goddard *v.* Pratt, 16 Pick. (Mass.) 412.

(*l*) Ex parte Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 Id. 57; Crawshay *v.* Collins, 15 Ves. 227, and 2 Russ. 342; Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, Id. 507; Butchart *v.* Dresser, 4 De G., M. & G. 542. N. B.—The *dicta* of Lord Eldon were not made in any case in which the power of one partner to bind the others after a dissolution was before him for decision.

(*m*) *I. e.*, if they are not trustees. Payment to one of several trustees is no discharge. Webb *v.* Ledsam, 1 Kay & J. 385.

(*n*) See Fox *v.* Hambury, Cowp. 445; Smith *v.* Stokes, 1 East 363; Smith *v.* Oriell, Id. 368; Harvey *v.* Crickett, 5 Mau. & S. 336; Morgan *v.* Marquis, 9 Ex. 145; Butchart *v.* Dresser, 4 De G., M. & G. 542; Re Clough, 31 Ch. D 324.

25. **Agency continuing for purposes of winding up—in general.**—Upon a dissolution, each partner has a right to settle the affairs, except in case of some agreement or order of court to the contrary. Granger *v.* McGilvra, 24 Ill. 152; Mayor *v.* Hawkes, 12 Ill. 298; Gannett *v.* Cunningham, 34 Me. 56; Milliken *v.* Loring, 37 Me. 408; Ruffner *v.* Hewett, 7 W. Va. 585; Robbins *v.* Fuller, 24 N. Y. 570; Heart *v.* Walsh, 75 Ill. 200; Nickels *v.* Mooring, 16 Fla.

Doctrine not admitted at law.—Lyon *v.* Haynes (*o*) is a strong authority to show that when an unincorporated company is dissolved

76; Riddle *v.* Etting, 32 Pa. St. 412; Ward *v.* Barber, 1 E. D. Smith (N. Y.) 423; Dowry *v.* Roberts, 2 Md. Ch. 157; Hall *v.* Clagett, 48 Md. 225.

Until the affairs of a partnership are settled, and outstanding engagements made good, the partnership must, in contemplation of law, have a continuance so far as respects the winding up of the concern. Brown *v.* Higginbotham, 5 Leigh (Va.) 583.

The remaining partners, after a dissolution, are entitled to the possession of the effects for the purpose of settling up the concern, and without interference, unless for good cause shown, on the part of strangers who may have purchased the shares of retiring partners. Reece *v.* Hoyt, 4 Ind. 169.

The fact that one partner remains in possession of the books and papers of the firm after dissolution, does not make him responsible for debts which he neglects to collect. Wilder *v.* Morris, 7 Bush (Ky.) 420.

A firm is bound, so far as benefited by a loan to a liquidator, to pay his debts. Prudhomme *v.* Henry, 5 La. Ann. 700.

The Missouri statute regulating the administration of partnership estates does not prohibit a surviving partner from winding up and settling the partnership concerns, unless he first give bond with security for the faithful discharge of his duties. Bredow *v.* Mutual Savings Institution, 28 Mo. 181.

Where one partner dies after dissolution but before the firm's affairs have been settled, the other partner obtains the rights of a surviving partner. Ober *v.* Indianapolis, &c., R. R. Co., 13 Mo. App. 81.

A solvent partner of a firm which has been dissolved by the separate insolvency of the other partners, is not entitled as of right to administer the partnership assets and settle his affairs. Hubbard *v.* Guild, 1 Duer (N. Y.) 662.

Where one of two copartners sells all his interest in the firm property to the other, who assumes the firm liabilities, this confers upon the latter the usual powers of a liquidating partner, and among others, the power of disposing of claims by arbitration. Becker *v.* Boon, 61 N. Y. 317.

While, as a general rule, each partner has the right to apply any of the firm funds in his hands in payment of the firm debts, yet the court may, in its discretion, direct such partner to pay such moneys into court. Carper *v.* Hawkins, 8 W. Va. 291.

Carrying out contracts made previous to the dissolution.—A dissolution of partnership revokes the authority of one partner to bind the other in respect of any new contracts, and restricts it to the settlement of the partnership concerns. Bell *v.* Morrison, 1 Pet. (U. S.) 351; Neal *v.* Hassan, 3 McCord (S. C.) 278; Chase *v.* Kendall, 6 Ind. 304; Palmer *v.* Dodge, 4 Ohio St. 21; Perrin *v.* Keene, 20 Me. 355;

(*o*) 5 Man. & G. 504. The question in this case was whether an action would lie by a shareholder against directors for not applying the assets of the company as prescribed by a resolution made after the company had been dissolved. It was held that such action did not lie, although the directors had assumed to wind up the company under the authority of the resolution.

by a resolution of a meeting competent to dissolve it, the power of a majority of shareholders to bind the minority is at an end, and

Ellicott *v.* Nichols, 7 Gill (Md.) 85; Hurst *v.* Hill, 8 Md. 309; Speake *v.* White, 14 Tex. 364; Bank of Port Gibson *v.* Baugh, 9 Sm. & M. (Miss.) 290; Sutton *v.* Dillaye, 3 Barb. (N. Y.) 529; Whitehead *v.* Bank of Pittsburg, 2 Watts & S. (Pa.) 172.

It is proper, after dissolution, to carry out a partly performed contract made previously thereto. Holmes *v.* Shands, 27 Miss. 40.

For the purpose of carrying out a contract, intended to be fulfilled after dissolution, the partnership continues after the dissolution. Western Stage Co. *v.* Walker, 2 Clarke (Iowa) 504.

It is not necessary that each partner be put separately in default, after dissolution, on a contract made before. Delivery of goods sold to the firm may be accepted by, and the price may be demanded of, any of the partners in such a case. White *v.* Kearney, 2 La. Ann. 639.

Admissions made after dissolution. —The admissions of a partner, made after the dissolution of the partnership, are not admissible in evidence to bind the partnership. Bispham *v.* Patterson, 2 McLean (U. S.) 87; Mercer *v.* Sayre, Anth. (N. Y.) 119; Barringer *v.* Sneed, 3 Stew. (Ala.) 201; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300; Burns *v.* McKenzie, 23 Cal. 101; Daniel *v.* Nelson, 10 B. Mon. (Ky.) 316; Hamilton *v.* Summers, 12 Id. 11; Pope *v.* Risley, 23 Mo. 185; Bank of Vergennes *v.* Cameron, 7 Barb. (N. Y.) 143; Meggett *v.* Finney, 4 Strobh. (S. C.) 220; Berryhill *v.* McKee, 1 Humph. (Tenn.) 31. Thus, the admission of one partner as to the existence of a debt against the firm, made subsequently to dissolution, is not binding on the other partners. Wilson *v.* Torbet, 3 Stew. (Ala.) 296; Chardon *v.* Oliphant, Treadw. (S. C.) Const. 685; Yandes *v.* Lefavour, 2 Blackf. (Ind.) 371; Brady *v.* Hill, 1 Mo. 315; Ward *v.* Howell, 5 Harr. & J. (Md.) 60; Shelton *v.* Cocke, 3 Munf. (Va.) 191; White *v.* Union Ins. Co., 1 Nott & M. (S. C.) 556; Hackley *v.* Hastie, 3 Johns. (N. Y.) 536; Gleason *v.* Clark, 9 Cow. (N. Y.) 57; Brewster *v.* Hardeman, Dud. (Ga.) 138; Conery *v.* Hayes, 19 La. Ann. 325; Chardon *v.* Oliphant, 3 Brev. (S. C.) 183. But see Simpson *v.* Geddes, 2 Bay (S. C.) 533; Kendrick *v.* Campbell, 1 Bail. (S. C.) 522; Vinal *v.* Burrill, 16 Pick. (Mass.) 401. But the admissions of a partner, made after dissolution, are competent evidence against the firm as to any contract made prior to such dissolution. Mann *v.* Locke, 11 N. H. 246; Taylor *v.* Hillyer, 3 Blackf. Ind. 433.

Entries made, after dissolution, in the partnership books may be given in evidence against the party who made them. Simonton *v.* Boucher, 2 Wash. (U. S.) 473.

The admission by one partner of the satisfaction of a debt due to the firm will bind the partnership, although made after dissolution, unless his want of authority be proved. Beckam *v.* Peay, 1 Bail. (S. C.) 121.

In an action to recover the amount of a draft drawn on the plaintiff by partners, and accepted by him, the admissions of one of the partners, made after dissolution, that the draft was accepted by the plaintiff for the accommodation of the firm, may be given in evidence to charge the other partner. Gay *v.* Bowen, 8 Metc. (Mass.) 100.

Making bills and notes after disso-

that even as regards the mode of winding up the concerns of the defunct company, the majority of its shareholders cannot bind either a dissentient minority or absentees.

lution.—After dissolution, one partner has no power to bind the others by giving a note in the name of the late firm, even though it be given for a partnership debt. Draper *v.* Bissell, 3 McLean (U. S.) 275; Cunningham *v.* Bragg, 37 Ala. 436; Burr *v.* Williams, 20 Ark. 171; Chamberlain *v.* Bancroft, 24 Ga. 310; Richardson *v.* Moies, 31 Mo. 430; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300; Graves *v.* Merry, 6 Cow. (N. Y.) 701; National Bank *v.* Norton, 1 Hill (N. Y.) 572; Galliott *v.* Planters', &c., Bank, 1 McMull. (S. C.) 209; Bank of South Carolina *v.* Humphreys, 1 McCord (S. C.) 388; Loomis *v.* Pearson, 1 Harp. (S. C.) 470; Foltz *v.* Powrie, 2 Dessau. (S. C.) 40; Isler *v.* Baker, 6 Humph. (Tenn.) 85; Lange *v.* Kennedy, 20 Wis. 279; Conklin *v.* Osborn, 7 Ind. 553; Lockwood *v.* Comstock, 4 McLean (U. S.) 383; Long *v.* Story, 10 Mo. 636; Lusk *v.* Smith, 8 Barb. (N. Y.) 570; Morrison *v.* Perry, 11 Hun (N. Y.) 33; Van Valkenburg *v.* Bradley, 14 Iowa 108; Woodworth *v.* Donner, 13 Vt. 522.

After dissolution, one of the partners has an implied authority to pay the partnership debts, but not to state accounts on their behalf, or to execute notes even on account of a pre-existing liability. Woodworth *v.* Downer, 13 Vt. 522.

A note made during partnership, but not delivered until after dissolution, does not bind the partners not delivering it. Woodford *v.* Dorwin, 3 Vt. 82. S. P., Scott *v.* Shipherd, Id. 108.

A partner authorized to settle the business of his firm after its dissolution, has no authority to accept, in the firm name, a draft drawn for money borrowed by him to pay the debts of the firm. Hamilton *v.* Seaman, 1 Ind. 185.

A bill drawn on a firm, but not accepted till after a dissolution of the partnership publicly announced, binds only the partner who accepts. Tombeckbee Bank *v.* Dumell, 5 Mason (U. S.) 56.

One partner may bind the others after dissolution, by a note, if he have express authority so to do from the other partners standing by. Bower *v.* Douglass, 25 Ga. 714.

The settling partner of a firm may give the note of the firm after its dissolution, to release their property from an attachment for a just debt, and a surety signing such a note, with notice, is responsible. Kemp *v.* Coffin, 3 Iowa 190.

All the partners are bound by a note given by one of them after dissolution, for a debt contracted before dissolution, if the giving of notes for debts of the firm was customary while the partnership continued, and the creditor had no notice of dissolution. Pecker *v.* Hall, 14 Allen (Mass.) 532.

The liquidating partner may bind the others by giving a note for money borrowed and used for the purpose of paying a debt of the firm. Siegfried *v.* Ludwig, 102 Pa. St. 547.

One of the members of a dissolved partnership may receive back a promissory note, which they have wrongfully put into circulation while the partnership existed, and bind the other partners by such act. Torrey *v.* Baxter, 13 Vt. 452.

Indorsing notes after dissolution.—A valid title to a negotiable promissory note, payable to a copartnership

Other cases, which have been already referred to, (*p*) clearly show that after the dissolution of an ordinary partnership, no *one aware of the dissolution is entitled on any ground of im- [*219

firm, may be transferred by an endorsement made in the name of the firm by one of the copartners, though after dissolution, if such dissolution was unknown to the endorsee. Cony *v.* Wheelock, 35 Me. 366.

Where one of two partners, after dissolution, being authorized to settle the affairs of the firm, endorses, "without recourse," in the partnership name, a promissory note, payable to the firm, such endorsement conveys the legal title to the note. Waite *v.* Foster, 33 Me. 424.

Under authority, though by parol only, given to one partner by the others after dissolution, to sell a negotiable note made to the firm before dissolution, he may endorse such note "without recourse," in the name of the firm. Yale *v.* Eames, 1 Metc. (Mass.) 486.

One partner, even after dissolution, may endorse the note of the firm, payable to himself, given before dissolution. Temple *v.* Seaver, 11 Cush. (Mass.) 314.

After dissolution, one partner cannot, without authority from the others, endorse a note belonging to the firm. Fellows *v.* Wyman, 33 N. H. 351; Sanford *v.* Mickles, 4 Johns. (N. Y.) 224; Humphries *v.* Chastian, 5 Ga. 166; White *v.* Tudor, 24 Tex. 639.

Ordinarily, during the existence of the partnership, one partner, acting within the scope of the partnership's business, may sell and dispose of the entire interest in the partnership's effects; but when the firm, though not formally dissolved, has closed its business and reduced all its assets to the shape of two notes, payable to the firm, if one partner fraudulently transfers these, the purchaser takes them subject to the other partner's equity. Halstead *v.* Shepard, 23 Ala. 558.

A partner cannot be made liable on a note endorsed by his copartner with the social name, after the dissolution of the partnership, unless it is shown that he was benefited by the transaction or authorized the endorsement. Bogerau *v.* Guéringer, 14 La. Ann. 478.

One partner cannot bind his copartners by endorsing, in the firm name, a note given after the dissolution of the partnership, to renew a note given before the dissolution. Lumbermen's Bank *v.* Pratt, 51 Me. 563.

Renewing notes after dissolution.—After dissolution, the partner who is authorized to settle up the business of the partnership cannot renew a note in in the partnership name, which was given before the dissolution, so as to bind the other partner. Parker *v.* Cousins, 2 Gratt. (Va.) 372; Myatts *v.* Bell, 41 Ala. 222.

In respect to their creditors, copartners, after dissolution, are joint debtors and nothing more. What the joint makers of a promissory note may not do to enlarge, prolong, or continue existing liabilities, or to create a new one in regard to the debt, copartners, after dissolution, may not do. Payne *v.* Slate, 39 Barb. (N. Y.) 634.

Where a plaintiff in a judgment given him by a firm composed of three members, for liabilities incurred upon notes discounted for their use, continues his

(*p*) *Ante* p. *215, especially Kilgour *v.* Finlyson, 1 H. Bl. 156, and Abel *v.* Sutton, 3 Esp. 108. See, too, Pinder *v.* Wilks, 5 Taunt. 611.

plied agency to hold the members of the late firm responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation, in Abel *v.*

liability as accommodation drawer of new notes given by the firm, after he knows that one member has retired, he cannot in a *sci. fa.* to revive his judgment, in which the two surviving members of the old firm and the administrator of the retiring partner, who died after suit brought, are defendants, recover for the new liabilities assumed after the dissolution, unless they are renewals of the notes of the old firm. Hartley *v.* Kirlin, 45 Pa. St. 49.

The firm having endorsed a note, one of the partners may, after the dissolution of the firm, consent to the holder's compounding with and releasing the maker, and his consent will also bind the other partner, and make the firm liable for the balance due. Union Bank *v.* Hall, Harp. (S. C.) 245.

The members of a firm, in the publication of notice of their dissolution, used the following language: "Either of the parties are authorized to use the name of the firm in liquidation only of past business." *Held*, that this did not authorize the parties to renew a note given by the firm for a partnership debt, nor confer upon any of the parties powers which they did not possess by law. Martin *v.* Kirk, 2 Humph. (Tenn.) 529.

Waiving notice or protest.—Where a note has been endorsed by a partnership in the partnership name, one of the partners has authority to waive demand and notice after a dissolution and before the note becomes payable. Darling *v.* March, 23 Me. 184.

A liquidating partner who, after dissolution, gives a bill in payment of a firm debt, cannot waive protest so as to bind his former partner, especially when the latter was only a dormant partner. Mauney *v.* Coit, 80 N. C. 300.

Confessing judgment after dissolution.—A confession of judgment for a partnership debt, after a dissolution, binds only the partner making it. Herrick *v.* Conant, 4 La. Ann. 276; Mitchell *v.* Rich, 1 Ala. 228; Bennett *v.* Marshall, 2 Miles (Pa.) 436; Morgan *v.* Richardson, 16 Mo. 409.

A judgment note given by a surviving partner in the name of the late firm is void as a judgment, both against the estate of the deceased and the surviving partner. Castle *v.* Reynolds, 10 Watts (Pa.) 51.

Other acts which one partner may do after dissolution.—Presumptively, one partner has power, after dissolution, to dispose of an article belonging to the firm and left in his possession, either for himself or for the firm. Bach *v.* State Ins. Co., 64 Iowa 595.

After dissolution, one partner can compromise and settle a judgment valid against the late firm, and the others must contribute to the amount paid, though they did not assent to the compromise, and claim, but fail to show that they could have settled on better terms. Bass *v.* Taylor, 34 Miss. 342.

After dissolution, one of the partners, who has authority to collect the debts, may transfer to himself a debt due to the firm. Oxley *v.* Willis, 1 Cranch (U. S.) C. C. 436.

Where, after dissolution, one member of the firm defended and appealed from a judgment against the firm, it was held that the other members were likewise liable to a surety on the appeal bond,

Sutton, that if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all the concerns of the partnership.

who was afterward compelled to pay the judgment. Gard *v.* Clark, 29 Iowa 189.

If a claim is placed in the hands of two attorneys, practicing in partnership, and, before any steps are taken in the collection of the claim, the firm dissolves and one of the members takes charge of the claim, and renders all the services in its collection, and sues individually the owner of the claim for his fees in so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld. Anderson *v.* Tarpley, 12 Miss. 507.

A power of attorney, executed on the dissolution of a firm by two partners to a third, authorizing him to ask, demand, and receive the debts of the firm, and declaring the appointment irrevocable, does not operate as an assignment of such debts, and consequently does not render inoperative a release subsequently executed by one of the other members of the firm to one of its debtors. Napier *v.* M'Leod, 9 Wend. (N. Y.) 120.

One who has power to wind up a partnership in which he was concerned, by selling the merchandise belonging to the firm, has also power to receive payment, unless restrained by some special terms of the agency. Lamb *v.* Salters, 3 Brev. (S. C.) 130.

Various acts which are ultra vires.— The implied power to settle business after dissolution, does not authorize the liquidating partner to appear for his copartner in an action against the firm even though founded upon a firm indebtedness. Hall *v.* Lanning, 91 U. S. 160; Haslet *v.* Street, 2 McCord (S. C.) 311; Loomis *v.* Pearson, Harp. (S. C.) 470.

A partner cannot acknowledge service of a writ for his former partner, after dissolution, where the writ is sued out against both on a partnership liability. Demott *v.* Swain, 5 Stew. & P. (Ala.) 293.

The receipt of property is not in itself a payment of a debt, and can only become so by an agreement to receive such property as payment. Such an agreement is a new contract, and will not be binding on the firm, if made by a former partner after the dissolution, without the consent of his copartner. Kirk *v.* Hiatt, 2 Ind. 322.

The use of the money of a third person by one partner will not render the other partner liable after dissolution, when he has derived no advantage from such use and has not ratified the act of his partner in using such money. Dunlap *v.* Limes, 49 Iowa 177.

After a dissolution and pending a liquidation, a partner can do no act, still less use the partnership funds, in a manner inconsistent with a just and proper settlement. Gridley *v.* Conner, 2 La. Ann. 87.

A liquidating partner who, having obtained judgment for the firm, becomes bankrupt, and at the assignee's sale buys in his interest in the judgment, cannot issue execution without showing a subsequent authority from his former copartner. Florance *v.* Bridge, 5 La. Ann. 735.

After dissolution and an assignment by one partner to the other of all his

Extent of the doctrine.—The doctrine now in question cannot, it is submitted, be carried further than this, viz., that notwithstanding dissolution, a partner has implied authority to bind the firm

interest in the book debts and demands of the firm, with power to collect them for his own benefit, an attempt by the partner so assigning to control one of those demands against himself, and to direct that it should not be allowed in set-off, can have no effect. Davis *v.* Briggs, 39 Me. 304.

Where the articles of copartnership provide that on the dissolution of the copartnership, its effects shall be divided among the partners, the partners become, on such dissolution, merely tenants in common, and no one of them can set off or sell the share of the other without his consent. Phillips *v.* Reeder, 18 N. J. Eq. 95. See, also, Hagendobler *v.* Lyon, 12 Kan. 276.

After dissolution, one partner, though he is authorized to settle the partnership concerns, has no right to receive goods consigned to the partnership for sale prior to the dissolution; and a purchase of the goods by a person having knowledge of the facts, to pay a debt due him from the partnership, is void. Stiernermann *v.* Cowing, 7 Johns. (N. Y.) Ch. 275.

After dissolution, one partner, without the consent of the other, cannot assign the partnership effects for the benefit of preferred creditors. Egberts *v.* Wood, 3 Paige (N. Y.) 517; Deckert *v.* Filbert, 3 Watts & S. (Pa.) 454.

After the death of one partner, an assignment of the partnership funds, by the surviving partner, for the payment of a separate debt of the deceased partner, in preference to the partnership debts, is void. Hutchinson *v.* Smith, 7 Paige (N. Y.) 26.

After dissolution, one of the partners cannot dispose of the partnership *choses in action* without the authority or assent of the other, so as to make him liable upon any covenants or obligations which he assumes on such transfer. Bennett *v.* Buchan, 53 Barb. (N. Y.) 578.

A promise made by a partner, after the partnership has been dissolved, to pay a note on which the firm are endorsers, no notice of dishonor having been given, is not binding upon the other members of the firm. Schoneman *v.* Fegley, 7 Pa. St. 433.

After dissolution, one partner cannot discharge the debt of a third person to the firm, by a receipt given, for the release of his individual indebtedness, to such person, particularly where the debtor had notice not to pay such partner. Sims *v.* Smith, 11 Rich. (S. C.) 565.

During the existence of the partnership either party may make a valid assignment of the goods of the firm to secure debts due therefrom; but if the partnership, by mutual consent, is dissolved, and the debts, accounts and goods placed in the hands of a third person, to wind up and settle the firm business, neither partner can thereafter make a valid disposition of them. Mygatt *v.* McClure, 3 Head (Tenn.) 495.

One partner, after dissolution of the partnership, cannot bind the rest without their consent, by settling accounts with or allowing credits to customers of the firm. Rootes *v.* Wellford, 4 Munf. (Va.) 215.

Ratification or previous authority.—If a note, made payable to a firm, is endorsed by one of the partners after dissolution, and without authority from

so far as may be necessary to settle and liquidate existing demands and to complete transactions begun, but unfinished, at the time of the dissolution. (*q*) Even Butchart *v.* Dresser, (*r*) which goes further than any other case, does not carry the doctrine beyond this. In that case two persons in partnership as sharebrokers contracted to buy shares. Before paying for them they dissolved partnership, and that fact was known to their bankers. After the dissolution, one of the partners pledged the shares to the bankers for money to pay for their purchase, and authorized the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that as the bankers knew of the dissolution, they could not retain the shares against him. The Vice Chancellor, however, held that the partner who pledged the shares had authority, after the dissolution, to complete the contracts previously made by the firm; that he therefore necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his authority in raising the money by pledging them with the bankers as he had done. The Lords Justices took the same view. "The general law," it was said, "is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partner*ship for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item of the account."

*220]

the others, their subsequent ratification will supply the deficiency of authority. Leonard *v.* Wildes, 36 Me. 265.

If, after dissolution, one of the partners gives a note in behalf of the former copartnership, and the other partner pay a part of the note, such payment is *prima facie* evidence of an existing partnership, or of an authority to give the note. Eaton *v.* Taylor, 10 Mass. 54.

(*q*) See in Lyon *v.* Haynes, 5 Man. & G. 541, and in Smith *v.* Winter, 4 Mees. & W. 461, 462; Pollock Dig. (3d ed.) 83.

(*r*) 10 Hare 453, and 4 De G., M. & G. 542. Re Clough, 31 Ch. D, 324, was a similar case, only the pledge was for an old debt.

It is to be observed that in Butchart *v.* Dresser nothing was done except for the purpose of completing a transaction unfinished at the time of the dissolution. The case did not require the statement of so general a proposition as that until the affairs of a partnership are wound up, the agency of each partner continues to be as extensive as if no dissolution had taken place. At the utmost, the case under consideration decides that in the event of a dissolution it is competent for one partner to dispose of the partnership assets for partnership purposes. (*s*) But neither Butchart *v.* Dresser nor any other case shows that a person who knows that a partnership is dissolved can hold one partner liable for acts of his late copartners done subsequently to the dissolution and without authority; and if in Butchart *v.* Dresser the money to pay for the shares had been raised by a bill, it could not, consistently with prior decisions, have been held that the dissolved firm was liable, either upon the bill itself or for the money raised by its means.

Before leaving this subject it is necessary to notice Ault *v.* Goodrich, (*t*) which is sometimes supposed to go much further than it really does. In that case two persons, Wilcox the elder and Wilcox the younger, partners as timber merchants, entered into a joint speculation with the plaintiff and another in the purchase and sale of some trees. Wilcox the younger had the chief management of the affair, and before the adventure was closed the two Wilcoxes dissolved partnership. Wilcox the younger seems to have misapplied some of the moneys received by him on the joint account, and it was considered clear that Wilcox the elder was responsible for the *dealings and transactions of Wilcox the younger during the continuance of their partnership. It was also considered that as there was no evidence of any new agreement between any of the parties upon the dissolution of partnership between the Wilcoxes, the other parties to the adventure were to be treated as having continued to rely on the joint responsibility of the two Wilcoxes in respect of the dealings of Wilcox the younger. Wilcox [*221

(*s*) *Quære*, if Lewis *v.* Reilly, 1 Q. B. it. But see Smith *v.* Winter, 4 Mees. & W. 454.
349, and *ante* p. *216, can be supported on this principle? Lord Denman's judgment seems to have proceeded on

(*t*) 4 Russ. 430.

the elder was accordingly declared to be responsible for the conduct of Wilcox the younger after the dissolution.

Upon this case it may be observed, first, that the facts are not satisfactorily stated; and secondly, that the judgment leads to the inference that the responsibility of Wilcox the elder for the conduct of Wilcox the younger did not turn upon the circumstance that they were partners, but upon the circumstance that they were jointly entrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not. [26]

What amounts to notice of dissolution. Notice in case of retirement of dormant partner.—It has been already seen that when a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. (*u*) The reason is, that as he was never known to be a partner, no one can have relied on his connection with the firm, or

26. Extent of the doctrine.—For the purposes of liquidation the surviving partner has a right to the possession of all of the assets of the firm. Hoolev *v.* Gieve, 9 Daly (N. Y.) 104. Thus, either partner may continue to use trade-marks belonging to the firm unless he has in some manner transferred or divested himself of the right so to do. Hazard *v.* Rasuell, 93 N. Y. 259; S. C., 45 Am. Rep. 198.

If, at the time of dissolution, the firm was under obligation to execute a guaranty, and one partner executes it, the firm will be bound thereby. Star Wagon Co. *v.* Swezy, 59 Iowa 609.

When, in the advertisement of dissolution, power is given to the continuing partner to settle the business of the firm, and for that purpose to use the partnership name, the jury may infer, from the transactions of trade, and the usage and custom of merchants, as well as from the advertisement itself, whether this power extends to the signing of the partnership name to renewals of a note which had been discounted in bank previous to the dissolution; and it is not necessary that the authority should be given by a special power of attorney, or other written instrument. Myers *v.* Huggins, 1 Strobh. (S. C.) 473.

But a general authority to settle the business does not warrant the giving a note in the name of the firm for a firm debt, or in exchange for a note given before dissolution. Brown *v.* Chancellor, 61 Tex. 437. And the liquidating partner cannot bind the others by endorsing a new draft and substituting it for any old one, and the creditor taking such draft with knowledge of the facts, cannot hold the other partners upon it. Macon Bank *v.* Ells, 68 Ga. 192.

The duty of surviving law partner as to carrying on pending litigations for the benefit of the estate of deceased partner, pointed out. Sterne *v.* Goep, 20 Hun (N. Y.) 396.

(*u*) *Ante* p. *212.

truly allege that when dealing with the firm he continued to rely on the fact that the dormant partner was still connected therewith.

Notice in case of retirement of ostensible partner.—But when an ostensible partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. (*x*) And even those who never had dealings with the firm and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. (*y*) [27]

(*x*) See per Lord Selborne in Scarf *v.* Jardine, 7 App. Cas. 349.

(*y*) Parkin *v.* Carruthers, 3 Esp. 348.

27. Notice in case of retirement of ostensible partner.—A publicly advertised partner who fails to give notice, on retiring from the firm, continues liable. Stopping a newspaper notice of his connection with the firm is not sufficient. Uhl *v.* Harvey, 78 Ind. 26. But actual notice is all that is necessary; direct personal notice to the firm's customers is unnecessary. The retiring partner escapes liability if they know of his retirement in any way; but the burden of proof is upon him to show his withdrawal. Uhl *v.* Bingaman, 75 Ind. 365.

The liability of a retiring partner for debts contracted in his name subsequent to his retirement attaches to a merchant who abandons his business, leaving it to be carried on in his name by a relative. Nicholson *v.* Moog, 65 Ala. 471.

A retiring partner of a firm is not exonerated from responsibility for subsequent engagements made in the name of the partnership with persons previously in the habit of dealing with it, unless special notice of the withdrawal be given them. Denman *v.* Dosson, 19 La. Ann. 9; Pope *v.* Risley, 23 Mo. 185.

A retiring partner must use proper diligence to inform the public. The extent of diligence must be measured with a reasonable regard to circumstances, and ought not to be brought down to the inflexible standard of publication at the partnership domicile, where such standard would expose the public to an inequitable risk. Grinnan *v.* Baton Rouge Co., 7 La. Ann. 638.

Where a notice of a change of firm name is relied on to exonerate one who has been a partner, such change must indicate that he has withdrawn from the business, so as to put dealers with the concern upon inquiry. American, &c., Co. *v.* Wortendyke, 24 N. Y. 550.

Where the withdrawal of one partner from a firm is concealed, he remains jointly liable upon debts contracted afterwards to parties not aware of such withdrawal. Buffalo City Bank *v.* Howard, 35 N. Y. 500.

A commission firm sent "price-currents" to all shippers who had dealings with it. These gave the firm name as well as the names of the individual partners. Plaintiff had received these lists prior and subsequent to June, 1882. On June 5th, 1885, he made them a consignment. One of the partners retired in February, and another in November, 1882, and the third about a

Old customers entitled to special notice.—An old customer, how-
*222] ever, is entitled to a more *specific notice than a person who never dealt with the firm at all; (z) and in considering

year later. The business was continued under the old name, with their consent. After November, 1883, the lists sent plaintiff no longer showed the individual names, but in all other respects were the same. The partnership was formally dissolved July 1st, 1884, and on that date notices were published in the local papers and circulars mailed to correspondents. Plaintiff did not receive a copy of the circular, nor had he any knowledge of any change in the firm when he made the shipment of June 5th, 1885. *Held*, that plaintiff was entitled to notice of the several changes in the firm; and having made the shipment in good faith, and on the credit of the firm, he was entitled to a recovery against all the members for the conversion of the proceeds of its sale. Bloch *v.* Price, 32 Fed. Rep. 562.

In Parkin *v.* Carruthers (3 Esp. 248, 249) Mr. Justice Le Blanc said: "The principle on which I proceed is this: that there was a partnership subsisting under the firm of Parkin, Campbell & Co., which continued after the retirement of John Campbell. The rule of law is clear that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm." In summing up to the jury, the same judge laid it down as the law on the subject "that if the plaintiff advanced the money, even after the time that one of the partners had retired, if he did not know of such retirement, he had a right to sue all who before constituted the partnership. In point of fact, in this case, John Campbell had retired; but still, if this was really a partnership, and the money was lent to the persons carrying on trade under that firm, all were liable."

Again, in Carter *v.* Whalley (1 B & Ad. 11), Mr. Justice Parke said: "The plaintiff was bound to show an acceptance by four parties; that is, that Veysey, who did accept the bill, was authorized to do so by the three others named in the declaration. Saunders had given no direct authority; he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before, as a member of the firm, or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But in order to render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions or public notoriety. In the present instance that was not so. The name of the company

(z) Graham *v.* Hope, Peake 154.

whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm.

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at large by advertisement, and to old customers by some special communication.[28]

gave no information as to the parties composing it, and the plaintiff did not show that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one as that the plaintiff must have known it. Carter, the plaintiff, lived at Birmingham; it should have appeared that there had been such a dealing at that place by Saunders, or that his connection with the company had been so generally known there that a knowledge of it by Carter must have been presumed. There having been no evidence for the jury on these points, I think the nonsuit was right."

28. **Old customers entitled to special notice.**—It is a well-established rule that to affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. Johnson *v.* Totten, 3 Cal. 343; Page *v.* Brant, 18 Ill. 37; Williams *v.* Bowers, 15 Cal. 321; Ennis *v.* Williams, 30 Ga. 691; Lowe *v.* Penny, 7 La. Ann. 356; Skannel *v.* Taylor, 12 Id. 773; Reilly *v.* Smith, 16 Id. 31; Zallar *v.* Janvrin, 47 N. H. 324; Vernon *v.* Manhattan Co., 17 Wend. (N. Y.) 524; Wardwell *v.* Haight, 2 Barb. (N. Y.) 549; Como *v.* Port Henry Iron Co., 12 Id. 27; Felbretch *v.* Armstrong, 5 Robt. (N. Y.) 339; Williams *v.* Birch, 6 Bosw. (N. Y.) 299; Schieffelin *v.* Stevens, 1 Winst. (N. C.) No. 1, 106; Little *v.* Clarke, 36 Pa. St. 114; White *v.* Murphy, 3 Rich. (S. C.) 369; Hutchins *v.* Hudson, 8 Humph. (Tenn.) 426; Kirkman *v.* Snodgrass, 3 Head (Tenn.) 370; Tudor *v.* White, 27 Tex. 584; Prentiss *v.* Sinclair, 5 Vt. 149; Austin *v.* Holland, 69 N. Y. 571; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514; Carmichael *v.* Greer, 55 Ga. 116; Davis *v.* Willis, 47 Tex. 154; Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321; Denman *v* Dosson, 19 La. Ann. 9; Epps *v.* Dillaye, 6 Barb. (N. Y.) 244; Holland *v.* Long, 57 Ga. 36; Kenney *v.* Atwater, 77 Pa. St. 34; Pope *v.* Risley, 23 Mo. 185; Polk *v.* Oliver, 56 Miss. 566; Re Krueger, 2 Low. (U. S.) 66; Stewart *v.* Sonneborn, 51 Ala. 126; Shamburg *v.* Ruggles, 83 Pa. St. 148.

Publication of notice of dissolution in a newspaper, at the place where the business is carried on, is not sufficient to relieve a retiring partner from liability for subsequent transactions in the firm name with one having dealings with the firm prior to the dissolution; in such case notice must be brought home to the dealer, or it must appear that facts came to his knowledge sufficient to advise him, or to give him reason to believe that a dissolution had taken place. Austin *v.* Holland, 69 N. Y. 571, 575; Gilchrist *v.* Brande, 58 Wis. 184.

To dealers, actual notice is required; publication in a paper which has no circulation in the creditor's neighborhood is not sufficient. Richards *v.* Butler, 65 Ga. 593.

Who are deemed old customers or dealers.—The retiring partner need not notify persons who deal with the firm for the first time after dissolution, unless

Public notices by advertisement.—Public notice given by advertisement in the "Gazette" is sufficient, not only against all who can

he permits his name to be used, or so acts as to induce them to believe that he is a member of the firm. Gaar *v.* Huggins, 12 Bush (Ky.) 259.

A bank with which a firm has for several years kept an account, wherein the firm is credited with the amounts deposited by it, and charged with the amounts withdrawn, is a dealer with the firm, within the meaning of the rule requiring actual notice of the dissolution of a firm to be given to all persons who had previously been dealers with it. This is especially so where, on the dissolution of the firm (Martin Herz & Co.), Martin Herz retires, and, by agreement, his former partner carries on the business under the former firm name. Nat. Shoe and Leather Bank *v.* Herz, 24 Hun (N. Y.) 260. But the fact that a bank has discounted notes bearing the names of a partnership does not constitute them dealers, so as to require actual notice of dissolution to exonerate a retiring partner. City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Same *v.* Dearborn, Id. 244. But see Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458.

Where a notice of dissolution is not given to an employee of the firm, the retiring partner remains liable to such employee for his compensation. Austin *v.* Holland, 69 N. Y. 511.

A client who gives a note to a firm of attorneys to collect may hold either of them for the proceeds, notwithstanding a subsequent dissolution of the firm which has not been brought to his knowledge. Waldeck *v.* Brande, 61 Wis. 579.

In an action on a note signed by a firm, evidence that one partner told several persons, prior to the execution of the note, that the firm was dissolved, is inadmissible to prove a dissolution when no notice is shown to the plaintiff, the payee. Pursley *v.* Ramsey, 31 Ga. 403.

The facts that plaintiff, in dealing with a partnership of which defendant was a member, did not know that defendant was the responsible party in the firm, and that the firm owed plaintiff nothing at the time of its dissolution, do not relieve defendant of the necessity of giving plaintiff actual notice of the fact of such dissolution. Elkinton *v.* Booth (Mass.), 10 N. E. Rep. 460.

Instances.—The defendants had been partners previous to March, 1857, at which time they dissolved partnership, and advertised the dissolution in a newspaper published in the town where they had done business. The business was continued by one of the partners, who, in the fall of 1857, bought coal of the plaintiffs, which the latter sold with no knowledge of the dissolution, and on the credit of the partnership. The plaintiffs had sold coal in one instance to the defendants before the dissolution, which was the only dealing they had had with them, but the defendants had been regular customers of a firm which sold coal at the same place, and to which the plaintiffs had succeeded, the former firm having consisted of one of the plaintiffs and one A, and the present firm of the same plaintiff and one B, who had, for some years, been a clerk of the former firm. *Held*, that the plaintiffs were to be regarded as having had "former dealings" with the defendants, and that they could be affected only by actual notice of the dissolution. *Held*, also, that the lapse of time between the disso-

be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not. (*a*) But an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it. (*b*) If, however, it can be shown that he was in the habit of taking the paper, (*c*) that is evidence to

lution and the purchase of the coal, the fact that the plaintiffs were doing business in the same town with the defendants, and the fact that an advertisement of the plaintiffs stood next to the advertisement of the dissolution in the newspaper; although, to be considered in determining whether the plaintiffs had actual notice, were of no avail in law against the fact that they had no actual knowledge of the dissolution. Lyon *v.* Johnson, 28 Conn. 1.

Where a small amount of goods has been sold to a partnership without any fixed period of credit, but not paid for till some months after the sale, the vendors of the goods are properly dealers with the partnership, and must receive actual notice of the retirement of a member to release him from his liability to them as a partner, upon sales to the partnership subsequent to his retirement. Clapp *v.* Rogers, 12 N. Y. 283; S. C., 1 E. D. Smith 549.

Where a firm had been dealers with a bank in their copartnership business, and their character as partners was known to the bank, and it was in the bank-book of the firm that a note was entered as having been discounted on their behalf, the signature of the firm being endorsed thereon—it was held, in a suit to charge the firm as endorsers of the note, that the relation of the firm to the bank was such as to require notice of dissolution to be given to the bank; and that an advertisement of dissolution in a newspaper was not sufficient to relieve one of the partners from his liability upon the note. Bank of the Commonwealth *v.* Mudgett, 45 Barb. (N. Y.) 663.

Sufficiency of notice, how proved and when presumed.—It matters not how notice of dissolution is given, whether by the retiring partners or in any other way, provided actual notice of the fact of dissolution is brought home to former customers and correspondents. Holtgreve *v.* Wilkner, 85 Ill. 471. S. P., Young *v.* Tibbitts, 32 Wis. 79; and see Ransom *v.* Loyless, 49 Ga. 471.

To charge a person with notice of dissolution given to his agent, the authority of the agent to act for his principal in receiving such notice must be shown. Stewart *v.* Sonneborn, 49 Ala. 178.

Notice of dissolution of a firm to one of its customers may be inferred from circumstances. Coddington *v.* Hunt, 6 Hill (N. Y.) 595; Mauldin *v.* Branch Bank, 2 Ala. 502.

Where the facts are ascertained, it is a question of law whether notice of dissolution is reasonable or not. Mowatt *v.* Howland, 3 Day (Conn.) 353.

What is a sufficient notice to previous dealers with a firm of its dissolution by the retirement of one of the partners, see Hier *v.* Odell, 18 Hun (N. Y.) 314.

(*a*) Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375; Godfrey *v.* Macauley, 1 Peake N. P. 209; Newsome *v.* Coles, 2 Camp. 617.

(*b*) Leeson *v.* Holt, 1 Stark. 186; Boydell *v.* Drummond, 2 Camp. 157, and 11 East 144, note.

(*c*) Showing that the paper circulated

go to the jury of his having seen, not only the particular paper containing the advertisement, but also the advertisement itself; (*d*) and if the jury are satisfied that he saw the advertisement, that will be sufficient, although no advertisement was inserted in the "Gazette." (*e*) 29

in his neighborhood goes for nothing alone. Norwich and Lowestoft Co. *v.* Theobald, Moo. & M. 153.

(*d*) See Jenkins *v.* Blizard, 1 Stark. 418, where, however, the plaintiff had a verdict; Rowley *v.* Horne, 3 Bing. 2.

(*e*) Rooth *v.* Quin, 7 Price 193.

29. Public notices by advertisement.—Notice of the dissolution of a partnership by publication in some newspaper of general circulation is conclusive upon all persons who have not had dealings with the firm. Shurlds *v.* Tilson, 2 McLean (U. S.) 458; Watkinson *v.* Bank of Pennsylvania, 4 Whart. (Pa.) 482; Gallicott *v.* Planters' and Mechanics' Bank, 1 McMull. (S. C.) 209; Mauldin *v.* Branch Bank, 2 Ala. 502; Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 280; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300; Prentiss *v.* Sinclair, 5 Vt. 149; Graves *v.* Merry, 6 Cow. (N. Y.) 701. And to those who had such dealings. Martin *v.* Walton, 1 McCord (S. C.) 16.

To avoid liability to any one dealing with the firm on the faith of his membership, the retiring partner must give general notice to the public; notice to the former customers only is not enough. Backus *v.* Taylor, 84 Ind. 503.

Publication of such a notice as is likely to make the fact of dissolution generally known in the locality concerned, and to those who have dealt with the firm, is sufficient. Solom *v.* Kirkwood, 55 Mich. 256.

The notice must be such as to advise the public of the fact of dissolution, either by changing the name on the sign, publication in a newspaper, or otherwise. Private notice to former dealers will not affect subsequent ones. The sufficiency of the notice is for the jury to determine. Polk *v.* Oliver, 56 Miss. 566.

Proof of the notice of a dissolution in a daily newspaper is competent on the question whether a certain individual was aware of the dissolution or not. Smith *v.* Jackman, 138 Mass. 143. The publication of the notice in a newspaper taken by the plaintiffs is a fact from which the jury may infer actual notice. Treadwell *v.* Wells, 4 Cal. 260; Page *v.* Brant, 18 Ill. 37. See Hutchins *v.* Bank of Tennessee, 8 Humph. (Tenn.) 418. But notice of dissolution, published in a newspaper and accidentally reaching a bank director, will not affect the bank. National Bank *v.* Norton, 1 Hill (N. Y.) 572.

Evidence that notice of the withdrawal of a partner was published in a newspaper of the town in which the firm did business, and a copy of the paper sent to a customer in another town, with a red line drawn round the notice to call attention thereto, is insufficient to prove actual notice. Haynes *v.* Carter, 12 Heisk. (Tenn.) 7. But it raises a presumption of notice, but one which may be repelled by proof that the notice was not in fact received. Austin *v.* Holland, 69 N. Y. 571.

A party will not be affected by notice of the dissolution of a partnership by the certificate merely of the editors of a newspaper that a notice of the dissolu-

Such notice not indispensable.—An advertisement, moreover, is not indispensable; its place may be supplied by something else. Thus, a change in the name of a firm painted on its counting-house, accompanied by a removal of the business of the old firm (for the purpose of winding up), and coupled with announcements of the change by circulars sent to the old customers, was held to be sufficient without any advertisement as against a person who had not

tion was published in it, without proof that the party sought to be affected took or read the paper. Boyd *v.* McCann, 10 Md. 118.

Where, in an action on a book account against two copartners, one defended on the ground of a dissolution of the partnership and notice to plaintiff before goods bought, proof of advertisement of dissolution, in a paper which plaintiff did not take, or of defendant's declarations to plaintiff that he was going out of the firm, but that his money would remain in it, will not amount to notice. Williamson *v.* Fox, 38 Pa. St. 214.

An act of Canada, in relation to the registration of notice of dissolution of a firm, was held not to affect the rights of the Vermont plaintiffs in a suit brought in that state against members of a Canada firm on a note payable in Montreal. Wait *v.* Brewster, 31 Vt. 516.

Illustrations.—A, having had no previous dealings with a firm, but having heard of its existence, and who composed it, sold goods to one of the partners, and received in payment therefor a draft by him drawn upon the firm, and accepted in its name. At the time of the transaction the firm was in fact dissolved; but A had no notice thereof. *Held,* that in order to protect a retired partner against such acceptance of the draft at the suit of A, evidence tending to show a public and notorious disavowal of the continuance of the partnership was admissible. Lovejoy *v.* Spafford, 93 U. S. 430.

Two partners of a firm resided in New York, and the third resided in Norwich, in Connecticut, their usual place of doing business. Upon dissolution, notice was given for several weeks successively in two newspapers, one printed at Norwich and the other at New London, in the vicinity of Norwich. One of the New York partners afterwards endorsed a bill of exchange in New York with the company name, but whether the endorsee had or had not actual notice of the dissolution, or whether he had ever been a correspondent of the company, did not appear. *Held,* that these facts constituted reasonable notice to him, and to every person not a correspondent of the company. Mowatt *v.* Howland, 3 Day (Conn.) 353.

Father and son bore the same name, and the father sold out his business to the son, publishing a notice of his retirement in two local newspapers. The son continued to use the old sign and his father's letter-heads, and bought a bill of goods, in his father's presence, from a drummer whose employer knew the father. There was no evidence of any intention to deceive. *Held,* that the father was not liable for the goods so purchased. Preston *v.* Foeliuger, 24 Fed. Rep. 680. But see Lindmeier *v.* Monahan, 64 Iowa 24.

been an old customer, and who was not proved to have had any distinct notice. (*f*) [30]

**Special notices.*—As against persons who dealt with the firm before any change in it took place, an advertisement, without more, is of little or no value, whether it be in the "Gazette" or elsewhere. (*g*) But if notice in point of fact can be established, it matters not by what means; for it has never been held that any particular formality must be observed. If an old customer can be shown to have seen an advertisement, that will be sufficient, and evidence that he took in a certain paper is some evidence that he knew of a dissolution advertised therein. (*h*) Again, general notoriety, a change in the name of the firm and advertisements, coupled with the execution of powers of attorney to the new firm, were held (Bolland, B., *dissentiente*) to warrant the jury in finding knowledge by an old customer of a change in the old firm. (*i*) So, in the case of bankers, a change in the name of the firm appearing on the face of the cheques used by their customers has been held sufficient notice to an old customer who had drawn cheques in the new form. (*k*) [31] [*223

Stamp on advertisements.—With respect to advertisements, it may be here remarked that an advertisement of an agreement to dissolve

(*f*) M'Iver *v.* Humble, 16 East 169; but see Gorham *v.* Thompson, 1 Peake N. P. 60.

30. Such notice not indispensable.—It matters not how the creditor learns of the dissolution of the partnership; and it is error for a judge to charge in such a way as to lead the jury to think a particular kind of notice necessary. Davis *v.* Keyes, 38 N. Y. 94.

(*g*) Graham *v.* Hope, Peake 154.

(*h*) *Ante* note (*d*).

(*i*) Hart *v.* Alexander, 2 Mees. & W. 484; 7 Car. & P. 746.

(*k*) Barfoot *v.* Goodall, 3 Camp. 147.

31. Special notices.—The depositing in the post-office of a letter, prepaid, containing a notice of dissolution, properly addressed to the creditor's post-office, is not conclusive evidence that the latter received it. Eckerly *v.* Alcorn, 62 Miss. 228; Austin *v.* Holland, 69 N. Y. 576. The presumption that a notice duly mailed to a firm creditor was received by him may be rebutted by proof that it was not received, and the question is properly left to the jury. Meyer *v.* Krohn, 114 Ill. 574. And the fact that a firm was in the habit of making "monthly reports or returns to persons consigning goods to them" does not show notice to a creditor of a change in the firm. Business letters, however, written to him by the new firm are admissible in evidence for that purpose. Hall *v.* Jones, 56 Ala. 493.

is not admissible in evidence unless stamped, but that an advertisement of an actual dissolution is admissible without a stamp. (*l*)

b. *Termination of liability as to past acts.*

Termination of partner's liability in respect of past transactions.— When once it can be shown that liability has attached to any partner, the *onus* of proving that such liability has ceased is upon that partner or those representing him. (*m*) The events which have to be considered with reference to this subject may be reduced to four classes, viz.—

1. Events over which his creditor has no control, *e. g.*, the death or bankruptcy of the partner.

2. Dealings and transactions between the creditor and the partner whose liability is in question.

*224] *3. Dealings and transactions between the creditor and the other members of the firm; and,

4. Lapse of time.

The second of these classes of events does not require special notice. The effect of bankruptcy and death will be examined in a subsequent part of this work. There only remain, therefore, to be considered here the third and fourth classes of events alluded to. 32

(*l*) May *v.* Smith, 1 Esp. 283; Jenkins *v.* Blizard, 1 Stark. 418.

(*m*) See 3 Mer. 619.

32. In general.—Three persons being sued as partners, proof that after part of the account sued upon was created, and the partnership dissolved, the retiring partner paid the others a sum of money to cover his responsibility for the firm debts, is irrelevant and inadmissible. Gooden *v.* Morrow, 8 Ala. 486.

If one partner withdraw from the copartnership, thereby causing its dissolution, he continues liable for the nonperformance of an executory contract previously entered into by the copartnership, in the same manner as if no dissolution had taken place. Whiting *v.* Furranet, 1 Conn. 60.

Where partners in trade take a lease of a store, and afterwards dissolve the partnership, the lease or the stock in trade does not cease to be partnership property as against the rent notes. Boone *v.* Sirrine, 38 Ga. 121.

If attorneys who are copartners accept a retainer, it is a joint contract, continuing to the termination of the suit, and neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or any other act or agreement between themselves. Walker *v.* Goodrich, 16 Ill. 341; Smyth *v.* Harvie, *supra;* Morgan *v.* Roberts, 38 Ill. 65.

As to when a dissolution of a firm by

Termination of joint obligations.—The nature of an obligation which is joint, or joint and several, is such that although each person subject to the obligation is responsible for its performance, yet each is not bound to perform it without reference to the question whether it has already been performed by the others. Whether the obligation be joint or joint and several, it has only to be performed once, and performance by any one of the persons obliged is available as a defence to a second demand made against the others. (*n*) And not only is a joint or joint and several obligation at an end when performed by one of the persons in whom it resides, but whatever extinguishes the right to demand performance of that obligation extinguishes the obligation itself and discharges all the persons in whom it resided. (*o*) But an event which merely disables a creditor from suing one of several persons jointly, or jointly and severally,

the withdrawal of a member and the transfer of his interest to the other will constitute such an abandonment of a contract between the firm and a creditor as will excuse the latter from the further observance of the contract, see Turk *v.* Nicholson, 30 Iowa 407.

If merchandise be consigned to and received by a firm to sell on commission, a partner afterwards retiring cannot, by notice of that fact to the consignor, avoid the liability which attached to him as a partner on receiving the goods, and refusing to admit evidence of such notice is not error in the court trying an action founded on such liability. Dean *v.* McFaul, 23 Mo. 76.

Where the retiring member of a law firm collects money for a client without authority, the other partners remain liable for such money. Bryany *v.* Hawkins, 47 Mo. 410.

The dissolution of a law partnership does not dissolve the relation to the client, and the client may look to both partners for the performance of a duty confided to the firm. McCoon *v.* Galbraith, 29 Pa. St. 293.

A, an attorney-at-law, associated with B, received from C a demand for collection. A retired from practice and left the claim with B, who became copartner with D, and B and D brought suit and recovered judgment on the demand, and the sheriff collected the money on execution, and paid it over to D. *Held*, in an action by C against A to recover the money collected on execution, that the sheriff was justified in paying the money to D, and that A was liable therefor. Wilkinson *v.* Griswold, 20 Miss. 669.

The defendants, who were copartners, doing business as factors in Charleston, employed the plaintiff, and contracted to give him all their draying; they afterwards dissolved their partnership, and the new firm did not employ him. *Held*, that the contract terminated with the partnership. Holmes *v.* Caldwell, 8 Rich. (S. C.) 247.

(*n*) See, as to payment by one, Watters *v.* Smith, 2 B. & Ad. 889; Thorne *v.* Smith, 10 C. B. 659; Beaumont *v.* Greathead, 2 Id. 494.

(*o*) See Cheetham *v.* Ward, 1 Bos. & P. 630; Ex parte Slater, 6 Ves. 146;

indebted to him, does not necessarily extinguish the debt. For example, if one of the persons indebted becomes bankrupt and obtains his discharge, although *his* liability is thereby at an end, yet the other persons indebted are not discharged from their obligation to pay. (*p*) So, a covenant by the creditor not to sue one of several persons liable jointly, or jointly and severally, does not extinguish the creditor's right to obtain payment, its effect only being to give the covenantee a right to be indemnified by the creditor against the conse*quences of an exercise of his right. (*q*) So, if the creditor receives from one of several debtors part of the [*225 debt, this does not discharge the others from their liability to pay the residue. (*r*)

In order to show the application of these principles to the discharge of a partner from a liability already incurred by him, it will be convenient to consider the effect of

1. Payment.
2. Release.
3. Substitution of debtors and securities.
4. Lapse of time.

An examination of these subjects will involve an inquiry into the mode in which retired partners and the estates of deceased partners cease to be liable to creditors of the firm to which they belonged.

1. *Payment.*

Payment by one partner of partnership debts.—Payment of a partnership debt by any one partner discharges all the others if the object of the partner paying was to extinguish the whole debt, or if he made the payment out of the partnership funds. (*s*) But if a firm is unable to pay a debt, and one partner, out of his moneys, pays it, but in such a way as to show an intention to keep the debt

Ballam *v.* Price, 2 Moo. 235; Cocks *v.* Nash, 9 Bing. 341; Wallace *v.* Kelsall, 7 Mees. & W. 264; Nicholson *v.* Revill, 4 Ad. & E. 675.

(*p*) 46 and 47 Vict., c. 52, § 30, cl. 4.

Crosse *v.* Smith, 7 East 256; Noke *v.* Ingham, 1 Wils. 89; 1 Wms. Saund. 207, *a*.

(*q*) See Lacy *v.* Kinaston, 1 Ld. Raym. 688; Dean *v.* Newhall, 8 T. R. 168; Walmesley *v.* Cooper, 11 Ad. & E. 216.

(*r*) See Watters *v.* Smith, 2 B. & Ad. 889.

(*s*) See the cases cited *ante* p. *224, note (*n*).

alive against the firm for his own benefit, this payment by him will be no answer to an action brought against the firm by the creditor suing on behalf of the partner who made the payment. (*t*) [33]

Imputation of payment made by one partner with money of firm.—If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner, with the moneys of the firm, makes a payment to the creditor without specifying the account on which it is paid, the payment must be taken to have been made on the partnership account and must be applied accordingly. (*u*) [34]

*226] **Payment by new firm discharges old firm.*—Inasmuch as a payment by A of B's debt, on behalf of B, enures to the benefit of B if the creditor accepts the money and B does not repudiate the payment, (*x*) it follows that if a firm is indebted, and by the retirement of the original partners and the introduction of

(*t*) McIntyre *v.* Miller, 13 Mees. & W. 725; *infra*, note (*y*).

33. Payment by one partner of partnership debts.—A creditor of a firm, receiving from one of the partners, after the firm is dissolved, the paper of third persons in payment of his partnership demand, and in exchange for the paper of the firm, thereby releases the other partners. But if the paper received in exchange be forged, then the transaction is void, and the original liability of all the partners revives. Pope *v.* Nance, 1 Stew. (Ala.) 354.

Two partners having dissolved, the liquidating partner gave a receipt to a firm creditor on a note, acknowledging the receipt of securities sufficient in amount to pay the note, and promising to deliver them on a surrender of the receipt. *Held*, such payment of the note as to discharge the other partner from his liability as surety. Colgrove *v.* Tallman, 2 Lans. (N. Y.) 97.

(*u*) Thompson *v.* Brown, Moo. & M. 40. See, also, Nottidge *v.* Prichard, 2 Cl. & F. 379, affirming Prichard *v.* Draper, 1 Russ. & M. 191.

34. Whether such payment applies to firm or private debts.—Where a surviving partner makes a payment from the firm assets to one who is a creditor both of the firm and of himself without stating to which indebtedness he wishes the money applied, the creditor is bound to apply it to the firm indebtedness. Wiesenfeld *v.* Byrd, 17 So. Car. 106.

Where the partnership funds of a firm have been misapplied by a member of the firm towards the payment of a judgment holden by the creditor of the firm against him for his individual debt, such creditor may, on the application of the other member of the firm, apply the payment to his demand against the firm, and enforce his judgment, notwithstanding a receipt given, applying the payment on account of the judgment. Campbell *v.* Matheus, 6 Wend. (N. Y.) 551.

(*x*) Co. Litt. 207, *a*. See Belshaw *v.* Bush, 11 C. B. 191; Jones *v.* Broadhurst, 9 C. B. 193, &c.; Kemp *v.* Balls, 10 Ex. 607; Lucas *v.* Wilkinson, 1 Hurlst. & N. 420.

other partners a wholly new firm is called into existence, a payment by the new firm, expressly or impliedly, on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm. (*y*)

As regards discharge by payment, it is important to bear in mind the general rules relating to the appropriation of payments, and especially the rule in Clayton's Case. The general rules upon this subject are as follows: (*z*)

General rules as to appropriation of payments.—1. Where one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first. (*a*)

2. But a debtor has no right to insist on paying a debt partly at one time and partly at another; (*b*) although if he does pay a debt in part and the creditor accepts the payment, the debt is extinguished to the extent of the payment thus made and accepted. (*c*)

3. The right of a debtor to appropriate a payment to whichever of several debts he prefers can only be exercised at the time of payment, not afterwards. (*d*)

*4. An appropriation by a debtor at the time of payment need not be express, but may be inferred from the nature of the debt and from the mode and circumstances of payment. (*e*) [*227

5. Where the debtor, having the opportunity so to do, (*f*) makes no appropriation, express or tacit, at the time of payment, the

(*y*) See Lucas *v.* Wilkinson, 1 Hurlst. & N. 420; McIntyre *v.* Miller, 13 Mees. & W. 725, where one partner paid a debt due from the firm, but had the debt transferred to a trustee for himself.

(*z*) For more detailed information the reader is referred to an article by the author in the Law Magazine for August, 1855 (vol. 54, p. 21).

(*a*) Peters *v.* Anderson, 5 Taunt. 596; Mitchell *v.* Cullen, 1 Macq. 190.

(*b*) Dixon *v.* Clark, 5 C. B. 365.

(*c*) As to payments of so much in the pound, see *infra*.

(*d*) Peters *v.* Anderson, 5 Taunt. 596.

(*e*) Ib., and see *infra*, rule 8.

(*f*) This is essential. See Waller *v.* Lacy, 1 Man. & G. 54; Young *v.* English, 7 Beav. 10.

creditor is entitled to appropriate the payment to whichever debt he pleases. (*g*)

6. And the creditor may exercise this right at any time he likes, (*h*) but when he has once exercised it and given notice of such exercise to the debtor, no different appropriation can be made. (*i*)

7. The creditor may exercise his right in appropriating a payment to a debt barred by the statute of limitations rather than to one that is not so barred; (*k*) to a simple contract debt rather than to a specialty debt; (*l*) to a new rather than to an old debt; (*m*) to a debt not guaranteed rather than to one that is; (*n*) and to a debt not bearing interest rather than to one which does. (*o*) But the debt must be one which is, or if not barred by time would be, enforceable by legal proceedings; (*p*) and one which exists at the time the payment was made; (*q*) and one which is then ascertained in amount; (*r*) and one which is owing by the debtor and not by other persons. (*s*)

*228] *8. In the absence of evidence to the contrary, an appropriation by the debtor is inferred, and the right of the creditor to appropriate differently is excluded in the following amongst other cases:

a. Interest is presumed to be paid before principal. (*t*)

(*g*) See Simson *v.* Ingham, 2 Barn. & C. 65, and the other cases cited in the next few notes.

(*h*) Phillpotts *v.* Jones, 2 Ad. & E. 41; Mills *v.* Fowkes, 5 Bing. N. C. 455.

(*i*) Simson *v.* Ingham, 2 Barn. & C. 65. See, as to representations made by the creditor, Wickham *v.* Wickham, 2 Kay & J. 478.

(*k*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffiths, 5 Mees. & W. 300; Nash *v.* Hodgson, Kay 650. Such an appropriation, however, does not amount to an admission by the debtor that the barred debt is due, and consequently does not take that debt out of the statute; see the last three cases.

(*l*) Peters *v.* Anderson, 5 Taunt. 596.

(*m*) Ib.

(*n*) Kirby *v.* Duke of Marlboro', 2 Man. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71; Pease *v.* Hirst. 10 Barn. & C. 122; Re Sherry, 25 Ch. D. 692. Compare Kinnaird *v.* Webster, 10 Ch. D. 139.

(*o*) Chase *v.* Cox, Freem. 261; Manning *v.* Westerne, 2 Vern. 606.

(*p*) Wright *v.* Laing, 3 Barn. & C. 165.

(*q*) Hammersley *v.* Knowlys, 2 Esp. 666.

(*r*) Goddart *v.* Hodges, 1 Cromp. & M. 33.

(*s*) See *infra*, rule 8 (*d*).

(*t*) Bower *v.* Marris, Car. & P. 351; Thompson *v.* Hudson, 10 Eq. 497; Warrant Finance Co.'s Case, 4 Ch. 643.

b. The earlier items of one entire account are presumed to be paid before the later items of the same account. (*u*)

c. Money coming to the hands of a creditor by the realization of a particular security is presumed to be appropriated to the debt thereby secured. (*x*)

d. Money belonging to one person is presumed to have been paid in discharging his own, and not another person's debt; and where a person fills several characters, the character in which he held the money which he paid *prima facie* determines the debt to which the payment must be appropriated. (*y*)

e. A dividend of so much in the pound on several debts is presumed to be paid in respect of them all, and must be applied accordingly. (*z*)[35]

(*u*) Clayton's Case, 1 Mer. 585, noticed *infra*.

(*x*) Brett *v.* Marsh, 1 Vern. 468; Young *v.* English, 7 Beav. 10; Pearl *v.* Deacon, 24 Beav. 186, and 1 De G. & J. 461.

(*y*) Burland *v.* Nash, 2 Fost. & F. 687; Nottidge *v.* Prichard, 2 Ch. & F. 379; Goddart *v.* Cox, 2 Str. 1194; Thompson *v.* Brown, Moo. & M. 40; Bowes *v.* Lucas, Andr. 55. Compare Sterndale *v.* Hankinson, 1 Sim. 393, and Beale *v.* Caddick, 2 Hurlst. & N. 326, where the rule in Clayton's Case also applied.

(*z*) Thompson *v.* Hudson, 6 Ch. 320; Hobson *v.* Bass, Id. 792; Raikes *v.* Todd, 8 Ad. & E. 846; Thornton *v.* McKewan, 1 Hem. & M. 525; Paley *v.* Field, 12 Ves. 435.

35. General rules as to appropriation of payments.—In his able treatise on Partnership, Mr. Collyer says, at page 321: "To render an appropriation of payment by the act of the party valid, it must be made at the time of payment, if made by the payor; and within a reasonable time after payment, if made by the payee. Sir William Grant was inclined to hold, according to the principles of the civil law, that the appropriation, even if made by the payee, must be made at the time of payment. But cases might be stated where such a rule, if strictly adhered to, would be productive of injustice; and it is manifestly at variance with the decisions on this subject in the courts of common law. On the other hand, those courts have been inclined to favor the creditor too much, and have in many cases 'extended the proposition—that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases—much beyond its original meaning, so as in general to authorize the creditor to make his election when he thinks fit.' In a recent case, however, the Court of King's Bench came to a very just decision on this important subject. Thus, in Simson *v.* Ingham, an action on a bond was brought by Bruce & Co., bankers, against the heirs and devisees of Benjamin Ingham. The bond was given by Ingham and another, bankers, at Huddersfield, to the plaintiffs, their London correspondents, conditioned for remitting money to provide for bills, and for the repayment of such sums as Bruce & Co.

Rule in Clayton's Case.—Of these rules the most important with reference to the subject matter of the present treatise is that which

might advance on account of persons constituting the Huddersfield Bank. The damages were assessed by an arbitrator at £13,845, subject to the opinion of the court upon the following facts: The house of Bruce & Co. were in the habit of sending to the Huddersfield Bank monthly statements of their accounts. Benjamin Ingham died in September, 1811. The last statement sent previously to his death was for the month of August. The balance of that account was greatly in favor of Bruce & Co. No alteration in the account was made in the books of Bruce & Co. immediately on the death of Benjamin Ingham; but, during the residue of that month and a part of October, the remittances made by the Huddersfield Bank, and the payments made for them by Bruce & Co., were entered in continuation of the former account. Before, however, any account was transmitted to the Huddersfield Bank, subsequent to that for August, Bruce & Co., in consequence of a communication with their solicitor, opened a new account, and in that inserted all the remittances and payments made subsequent to the death of Benjamin; and in November they transmitted to the Huddersfield Bank statements of two accounts. The first of these accounts was thus entitled: 'Debtors, Messrs. B. & J. Ingham & Co. (old account), in account with Bruce & Co., creditors;' and the first item on the debit side was the balance of August. The second account was in the same form, but entitled 'new account.' This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the month of October. From this time the old and new accounts were kept separate in the books of Bruce & Co. The Huddersfield Bank did not appear to have ever objected to the accounts being kept separately by Bruce & Co., although in their own books they only kept one account. The arbitrator was of opinion that, under these circumstances, the balance due on the death of Benjamin Ingham was not discharged by subsequent payments by the new firm. Accordingly, after making certain allowances for dishonored bills, he assessed the damages at the sum above awarded; and the Court of King's Bench held the award to be right. In the preceding case, the court proceeded on the principle that the entries, which had been continued in the creditor's books immediately on the death of Ingham, not having been communicated to the debtors, were not conclusive on the creditors, and consequently that the general legal appropriation, of which such entries would otherwise have been evidence, was incomplete. It is clear from this, as also from the express opinions of the judges, that they did not consider it necessary, in order to support any alleged appropriation on the part of the creditor, that he should prove it to have been made at the time of payment. On the other hand, if payment be made to the creditor of any sum in respect of an account current, the creditor making no appropriation at the time of payment, and if, after such payment, the debtor and creditor continue their mutual dealings, or do any other mutual act in respect of the same account, the creditor will be barred by such subsequent transactions

is known as the rule in Clayton's Case, (*a*) that where there is one single open current account between two parties, every pay-
*ment which cannot be shown to have been made in dis- [*229
charge of some particular item, is imputed to the earliest item standing to the debit of the payer at the time of payment. If, therefore, a customer of a firm of bankers has funds standing to his credit at the time they dissolve partnership, and his account is continued by their successors, they taking new deposits and honoring his drafts as if no change had occurred, and blending the accounts, then the payments first made by the new firm will be deemed to have been made in liquidation of the earliest item on the credit side of the customer's account, viz., the balance due to him at the time of the dissolution, and consequently, if, proceeding on this principle, that balance is liquidated, the customer has no claim against the old firm in respect of his account with them.

This doctrine is of great importance in questions relating to the discharge of retired and deceased partners. [36]

Effect of rule in the case of retired and deceased partners.—The application of the rule in question will discharge from liability the estates of deceased partners; (*b*) the estates of sole traders if their

from establishing an appropriation of the payment."

(*a*) 1 Mer. 572. See, in addition to the cases cited in the text as illustrating the rule in question, Ex parte Randleson, 2 Deac. & C. 534; Copland *v.* Toulmin, 7 Cl. & F. 349; Brown *v.* Adams, 4 Ch. 764; Laing *v.* Campbell, 36 Beav. 3. And as to the application of the rule to trust moneys mixed with other moneys, Re Hallett's Estate, 13 Ch. D. 696; Pennell *v.* Deffell, 4 De G., M. & G. 372.

36. **Rule in Clayton's Case.**—Where one partner, in order to induce another not to leave the firm, gives him a bond indemnifying him against acts and omissions of the third partner, who, both before and after the giving of the bond, misappropriated the funds of the firm, part of which he subsequently paid back without specific appropriation—it was held that such repayment should be appropriated in the order of time of his embezzlement, without reference to the time of the giving of the bond. Pardee *v.* Markle, 111 Pa. St. 548; S. C, 56 Am. Rep. 299.

A partnership was dissolved, and one partner continued to carry on the previous business, and was to settle the partnership business; such partner having subsequently paid to a creditor of the firm the amount due from himself separately, as well as from the firm, it was held that the retiring partner was discharged from the debt, though no appropriation was made at the time of payment. Baker *v.* Stackpoole, 9 Cow. (N. Y.) 420.

(*b*) As in Clayton's Case, 1 Mer. 572.

businesses have been carried on by others without any break; (*c*) and retired partners, whether known (*d*) or dormant. (*e*) Moreover, the discharge of the deceased or retired partner being the consequence of the payment of his former creditor, the discharge does not depend on the knowledge of the creditor of the change which has taken place in the firm. (*e*) It is true that if the creditor had known of the change he might have objected to continue to deal with the continuing or surviving partners unless the old and new accounts were kept distinct; but this circumstance does not entitle him to treat his old debt as still unpaid when he has in fact dealt on the footing of there being only one continuous account, and when on this footing he has been paid his old debt. (*f*)

*230] **Application of rule to all single running accounts. Discharge of surety.*—The rule in Clayton's Case applies to all accounts of the nature of one entire debit and credit account, without reference to any question of partnership, and is available not only by a firm against an old creditor, but also against a firm for the benefit of its debtors. For example, where a person becomes surety to a firm guaranteeing a debt owing to it by a third party, then, if the debt is an item in an account between this third party and the firm, and is liquidated by general payments with which he is credited, the debt guaranteed will be extinguished and the surety will be discharged, although upon the whole account there may always have been a balance owing to the firm. (*g*) On the other hand, if the guaranteed debt is not extinguished by the rule in question, the surety will not be discharged. (*h*) Moreover, the rule

(*c*) Sterndale *v.* Hankinson, 1 Sim. 393; Smith *v.* Wigley, 3 Moo. & S. 174.

(*d*) Hooper *v.* Keay, 1 Q. B. D. 178.

(*e*) Brooke *v.* Enderby, 2 Brod. & B. 70; Newmarch *v.* Clay, 14 East 239.

(*f*) See the last note. The creditors in those cases did not know of the changes in the firms with which they dealt. See, also, Merriman *v.* Ward, 1 Johns. & H. 371.

(*g*) See Kinnaird *v.* Webster, 10 Ch. D. 139; Bodenham *v.* Purchas, 2 Barn. & A. 39; Field *v.* Carr, 5 Bing. 11; Pemberton *v.* Oakes, 4 Russ. 154; Toulmin *v.* Copland, 3 You. & C. Ex. 625, and Copland *v.* Toulmin, 7 Cl. & F. 350; Bank of Scotland *v.* Christie, 8 Cl. & F. 214; Medewe's Trust, 26 Beav. 588. Compare Ex parte Whitworth, 2 Mont., D. & D. 164; City Discount Co. *v.* Maclean, L. R., 9 C. P. 692, where, notwithstanding the mode in which the books were kept, the real intention was to keep the second debt separate from the others.

(*h*) Re Sherry, 25 Ch. D. 692; Williams *v.* Rawlinson, 3 Bing. 71.

applies even as between persons who do not know that they are being affected by it, and who, if they did, might take care to exclude its operation. (*i*) [37]

(*i*) *Ante* note (*f*); Merriman *v.* Ward, 1 Johns. & H. 371; Scott *v.* Beale, 6 Jur. (N. S.) 559.

37. Application of rule to all single running accounts.—Where an account with the debtor of the firm is, with his knowledge and consent, continued in the surviving partner's name, in the absence of any direction from the debtor, subsequent payments may be applied in satisfaction of the original balance due to the firm. Boyd *v.* Webster, 59 N. H. 89.

In Bodenham *v.* Purchas (2 B. & Ald. 39) Mr. Justice Bayley said: "I cannot distinguish this in principle from Clayton's Case. The decisions in the courts of law do not break in upon the distinction there taken. The principle established by those decisions is this: that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases. But where the accounts are treated as one entire account by all parties, that rule does not apply. In this case the bond was given in 1801 for advances made or to be made in Havard's lifetime; at his death, the balance due was £4404. The surviving partners might then have called for payment of that sum, or they might have treated it as an insulated transaction and kept that as a distinct and separate account. But instead of that they blend it with the subsequent transactions; for in the first account delivered after Havard's death are included several items, down to the 30th of June, and the payments after his death reduce the balance at that time to £1420. They might even then have treated this balance as a distinct account, and as money due on the bond, if they had so chosen. Do they do so? Look at the next account; the parties balance their accounts every three months; and in the next quarterly account they bring forward the balance of £1420, and make it an item in one entire account subsisting between these parties. The account goes on from 1810 till 1813; and the then balance is treated as one entire balance of one entire account, as the result of all the transactions between the parties in the intermediate time. The plaintiffs were not bound to have so treated it at Havard's death; but, having done so, there is not any authority for saying that they are now at liberty to apply the several payments in reduction of the debt incurred by the subsequent advances to the exclusion of the bond debt. It certainly seems most consistent with reason that where payments are made upon one entire account, such payments should be considered as payments in discharge of the earlier items. Clayton's Case, where all the authorities were fully considered by the Master of the Rolls, is directly against the plaintiff's right to make any such appropriation as he desires. That case does not break in upon any of the cases at law, and ought to govern our decision in the present instance; and I am, therefore, of opinion that there ought to be judgment for the defendant."

In Pemberton *v.* Oakes (4 Russ. 154, 168) Lord Lyndhurst said: "The third question is whether the balance due from Stokes to the bank at the time of Harding's death has been discharged by his subsequent payments; and that

Rule applies against the debtor as well as against the creditor.—Further, as a creditor has no right to take the account subsisting between him and his debtor backwards, so as to make himself appear a creditor in respect of the earlier rather than of the later items of the account, so, on the other hand, a debtor, after making general payments in respect of one entire account, is not at liberty

point is decided by Clayton's Case, and Bodenham *v.* Purchas. It is true that the facts here are not, in every respect, precisely the same with the circumstances of these two cases. But the decisions in them proceeded on a broad general principle, equally applicable to the state of circumstances existing here. Where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts; if he does not appropriate it, the creditor may make an appropriation; but if there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation, according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. Here it is not pretended that any distinct appropriation of the payments was made by the parties. It was the practice of the bank to settle their accounts with Stokes quarterly, transferring, at the end of each quarter, the balance then due from him to the account of the next quarter. Harding died in the middle of a quarter, but on that occasion no change took place in the mode of settling the accounts. At the end of the then current quarter, the balance was struck exactly as if Harding had been alive, and no notice was taken of his death. There being no distinct appropriation of the payments, either by the one party or the other, the law makes the appropriation with reference to the order of the items of the account. If so, the debt which Stokes owed to the bank at the time of Harding's death has been discharged by the subsequent payments. In Bodenham *v.* Purchas, a court of law confirmed the rule which Sir William Grant had laid down in a court of equity. The point was again brought into discussion in Simson *v.* Ingham (2 Barn. & C. 65), and the principle was again confirmed, though the particular circumstances of the transaction produced a different decision. In that case, two accounts were formed by a London bank at the death of one of the partners in a country bank which dealt with them—the one was styled the old account, the other the new; and in the latter the London bank entered all the payments made to them by the country bank after the death of that partner—so that a distinct appropriation was made. The same question arose in Brooke *v.* Enderby, before the Common Pleas, and there, too, the principle of Clayton's Case was adopted. Feeling myself bound by the force and authority of these decisions, and acquiescing completely in the reasoning of Sir William Grant, I must decide that there was no debt due to Oakes and Willington under the indenture of the 4th of January, 1802, at the time when the memorandum was endorsed on the bond."

to have those payments applied in liquidation of the subsequent rather than of the earlier items. (*k*)

Effect on incoming partner.—This has an important bearing on the position of incoming partners, for although they are not liable for debts contracted before they joined the firm, still if such debts and others subsequently contracted are allowed by an incoming partner to *form one single running account and payments are made generally in respect of it, those payments, [*231 although made with the money of the new firm, will be applied to the old debt, and a balance will be left for which the incoming partner will be liable. (*l*) But the rule in Clayton's Case cannot be insisted on to the prejudice of a new partner without his consent, express or tacit. Without such consent a creditor of the old firm who goes on dealing with the new firm has no right to appropriate a payment made by a new partner to a debt owing by his copartners, nor to run two distinct accounts together, and treat a general payment as made in respect of the earliest items. Burland *v.* Nash (*m*) may be referred to as an illustration of this. In that case A succeeded B in business, and agreed with him to take his debts upon himself; A then contracted debts of his own to one of B's creditors, and A afterwards made such creditor a general payment on account; it was held that the creditor could not, without A's consent, apply this payment in discharge of the debt owing by his predecessor, B.[38]

(*k*) Beale *v.* Caddick, 2 Hurlst. & N. 329.

(*l*) See the last case, and also Scott *v.* Beale, 6 Jur. (N. S.) 559. This case is badly reported, but it is tolerably plain that the incoming partner was held liable to pay, not the debt due to the plaintiff when the partnership commenced, but the balance of moneys due to him on his whole account, and which balance consisted of moneys received by the defendants after the partnership between them was created.

(*m*) 2 Fost. & F. 687. *Quære*, whether the evidence did not warrant the inference that the two accounts had been run into one with the consent of the defendant.

38. **Effect of rule on incoming partner.**—A new member joined a firm which owed money on a running account, which account was continued after he joined the firm, and payments made from time to time. *Held*, that these payments could not be applied upon that portion of the account which was due when the new partner became a member of the firm. St. Louis Type Foundry Co. *v.* Wisdom, 4 Lea (Tenn.) 695.

Rule inapplicable where there are distinct accounts. Right of appropriation in such a case.—The rule in Clayton's Case, however, applies only to an entire unbroken account, and has no application to cases where one person is indebted to another in respect of several matters, each of which forms the subject of a distinct account. In such a case, if the debtor does not appropriate the payment when he makes it, the creditor is at liberty to apply the payment to whichever account he thinks proper. (*n*) Moreover, when a change takes place in a firm by the retirement or death of a member, a creditor of the firm is under no obligation to assent to a carrying over of his debt so that it shall form the first item in a fresh account with the new firm. He is at liberty to keep the accounts with the two firms distinct, and if he does so, payments made gen-

*232] erally by the new firm will not necessarily *go, by virtue of the rule in Clayton's Case, in liquidation of the debt owing by the old firm. A remarkable illustration of this is afforded by the well-known case of Simson *v.* Ingham. (*o*) There, two country bankers, Benjamin and Joshua Ingham, gave a bond to a London bank as a security for advances which it might make on account of the persons constituting the country bank, or either of them, associated or not with any other persons. Benjamin died, and at his death a considerable sum was due to the London bank for advances made to the country bank. The London bank was in the habit of sending in monthly accounts to the country bank. In the month following Benjamin's death the London bank received and paid considerable sums on account of the country bank, and the sums were entered by the London bank in its own books in continuation of the former account between it and the old country bank. No account, however, was sent to the country bank until two months after Benjamin's death, and then two accounts were sent, one of them being an account of receipts and payments prior to his death, and the other being an account of receipts and payments made subsequently thereto. A considerable balance was due to the London bank on the first of these accounts, and to recover this balance an action was brought against Benjamin's representatives. It was contended that his estate was discharged by virtue of

(*n*) *Ante* p. *227.

(*o*) 2 Barn. & C. 65.

the rule in Clayton's Case, the London bank having received, since his death, much more than sufficient to liquidate that balance; but it was held that the rule in question did not apply. The judgment of Mr. Justice Bayley contains such an admirable statement of the principles applicable to such cases that no hesitation has been felt in setting it out at length.

"The general rule is that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old *and new firms in one entire [*233 account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case, the partner died in September, 1814. If in the ordinary course of business, a monthly account had been sent in, stating the transactions before and after the death of the partner, as forming part of one entire account, and the balance is due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts—one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he kept for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time, he continues to have the option of applying the several payments as he thinks fit. For these reasons, I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore this award is right."

Right to blend accounts.—The case of Simson *v.* Ingham was decided upon the principle that a creditor of a firm has a right,

when a change occurs in the firm, to decide for himself whether the sum due to him from the old firm shall or shall not form an item in his account with the new firm. This principle is further illustrated by the case of Jones *v.* Maund. (*p*) There, three persons, A, B and C, were partners, and D was indebted to them in a sum secured by a covenant and a mortgage. A and B died, C retired and assigned her interest to E, who, with F, continued the business of the old firm under the old name. D continued to deal with the new firm, and he made it several payments, more than sufficient to liquidate the debt above mentioned if appropriated thereto. The mortgage had been realized and the sum arising from it had been applied in part discharge of *the debt secured by it. There was nothing to show that D's debt had been made an item in the account between him and the new firm, and it was consequently held that D had no right to insist that the payments made by him generally to the new firm should be applied to the balance due from him on his covenant. (*q*)

*234]

Transfer of debt from one account to another.—It should be borne in mind with reference to cases of this description, that one partner can bind the firm by assenting to a transfer of a debt due to or by it from one account to another. (*s*) [39]

Rule in Clayton's Case inapplicable where it defeats the intentions of the parties.—The rule in Clayton's Case, viz., that in current accounts it is presumably the sum first paid in that is first drawn out, or, in other words, that presumably it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side, is a rule based on the presumed intention of

(*p*) 3 You. & C. Ex. 347.

(*q*) The case was decided on demurrer, and according to the report it was held that the balance due on the covenant could not be considered as liquidated, unless it could be shown that it had, *with C's assent*, been made an item in the account between D and the new firm. But *quære* what C had to do with it, she having assigned all her interest in the debt to the new firm? Did she not thereby authorize the new firm to deal with the debt as it liked? See Pemberton *v.* Oakes, 4 Russ. 154.

(*s*) *Ante* pp. *230, *231; Beale *v.* Caddick, 2 Hurlst. & N. 326.

39. Transfer of debt from one account to another.—Taking an account of stock, and transferring the amount due to one partner to another firm of which he is a member, does not of itself dissolve the partnership. Russell *v.* Leland, 12 Allen (Mass.) 349.

the parties. (*t*) It is not, as is sometimes represented, a rule of law obtaining independently of their will, and consequently, if it can be shown that some other appropriation was intended, the rule ceases to be applicable. An intention to appropriate a payment to a later rather than to an earlier item in the account may be inferred from the usual course of business between the parties; (*u*) from the source from which the money was obtained; (*x*) from the security to meet which the payment was made; (*y*) from the fact that the earlier item was secured and intended to be kept separate from the *others; (*z*) from the fact that the payment was a dividend on all debts; (*a*) from the representations of the parties; (*b*) and from other circumstances. (*c*) [*235

An instructive case on this head is Wickham *v.* Wickham, (*d*) which, in substance, was as follows: a firm of Finch & Sons, as agents of the plaintiffs, supplied goods to the firm of Smith & Willey upon the terms that the latter should become debtors to the plaintiff in respect of such goods. Finch & Sons also supplied Smith & Willey with other goods on their own behalf. In the accounts between Finch & Sons and Smith & Willey no distinction was made between goods supplied by Finch & Sons on their own behalf and those which they supplied as agents of the plaintiffs. Smith & Willey made payments generally on account, and applying the rule in Clayton's Case, nothing was due from Smith & Willey in respect of the goods supplied to them on behalf of the plaintiffs. However, Edward Finch was a partner in both firms, and representations were made to the plaintiffs by the firm of Finch & Sons to the effect that a large debt was due to the plaintiffs from the firm of Smith & Willey, and Finch & Sons undertook that Edward

(*t*) Re Hallett's Estate, 13 Ch. D. 696; Wilson *v.* Hurst, 4 Barn. & Ad. 767, per Lord Denman. In Copland *v.* Toulmin, 7 Cl. & F. 349, there was evidence to show an agreement for a different appropriation, but it was not deemed sufficient to exclude the rule.

(*u*) Taylor *v.* Kymer, 3 Barn. & Ad. 320; Lysaght *v.* Walker, 5 Bli. (N. S.) 1.

(*x*) Stoveld *v.* Eade, 4 Bing. 154; Thompson *v.* Brown, Moo. & M. 40.

(*y*) Newmarch *v.* Clay, 14 East 240.

(*z*) City Discount Co. *v.* Maclean, L. R., 9 C. P. 692. See *ante* p. *230.

(*a*) *Ante* p. *228.

(*b*) Wickham *v.* Wickham, 2 Kay & J. 478; Merriman *v.* Ward, 1 Johns. & H. 371.

(*c*) See Henniker *v.* Wigg, 4 Q. B. 792. Compare Re Boys, 10 Eq. 467.

(*d*) 2 Kay & J. 478. See, too, Merriman *v.* Ward, 1 Johns. & H. 371.

Finch should use his influence as a partner in the firm of Smith & Willey to secure the reduction of such debt. Upon the faith of this representation and undertaking, the plaintiffs forebore to sue Smith & Willey. It was held that the firm of Smith & Willey was precluded from treating its debt to the plaintiffs as liquidated by the payments made by it to the firm of Finch & Sons; for it was not competent to the two firms so to arrange their accounts as to liquidate a debt which a person who was a partner in both firms represented to the plaintiffs as still owing to them.

Application of the rule in cases of fraud.—Upon the same principle, viz., that the rule in Clayton's Case is founded on the presumed intention of the parties, it follows that it cannot be applied as against a person who is a *creditor in respect of a fraud committed on him and of which he is ignorant. This, in fact, was determined in Clayton's Case itself. For Clayton, in addition to the claim which was held to have been discharged by the operation of the rule noticed above, (*e*) had another claim upon Devaynes' estate arising out of a breach of trust committed by a fraudulent sale of some exchequer bills, and of which sale he was kept in ignorance. The payments made to Clayton since Devaynes' death were more than sufficient to satisfy both claims; but it was held that the claim arising out of the concealed sale of the bills was not affected by those payments. (*f*) So, if one partner fraudulently overdraws his account with the firm, and keeps paying money in and drawing money out, so that his fraudulent overdrawing is never discovered, it will not be treated as having been made good so long as there is a balance against him. (*g*)

*236]

Imputation of payment where debts are owing to a firm and to a member of it.—Before leaving the subject of appropriation of payments, it may be as well to advert to a question of some difficulty which arises when a person indebted to a firm, and also to an individual member of it, pays him a sum of money under such circumstances that it cannot be ascertained on account of which debt the payment was made. In such a case ought the payment to be applied in liquidation of the debt due to the partnership or that due

(*e*) *Ante* p. *228.
(*f*) See Clayton's Case, 1 Mer. 572, 580.
(*g*) Lacey *v.* Hill, 4 Ch. D. 537.

to the individual member? Pothier (*h*) says that good faith requires that the partner receiving the money should apply it proportionally to both demands. The writer is not aware of any decision on this subject, but he apprehends that as between the partner and the debtor, the payment might be applied to either debt at the option of the partner, whilst, as between the partner and his copartners, good faith would require that the payment should be applied wholly to the partnership debt. (*i*)

*2. *Release.*

[*237

Release of one partner is a release of the firm. Covenant not to sue has a different effect.—A release of one partner from a partnership debt discharges all the others; (*k*) for where several persons are bound jointly or jointly and severally, a release of one is a release of them all. (*l*) But in this respect a covenant not to sue differs from a release; for although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant. (*m*) [40]

(*h*) Pothier, "Société," § 121.

(*i*) See Thompson *v.* Brown, Moo. & M. 40, and Nottidge *v.* Prichard, 2 Cl. & F. 379.

(*k*) Bower *v.* Swadlin, 1 Atk. 294; Ex parte Slater, 6 Ves. 146; Cheetham *v.* Ward, 1 Bos. & P. 630; Cocks *v.* Nash, 9 Bing. 341.

(*l*) See the last note, and as to joint and several obligations, Co. Lit. 233, *a*; Lacy *v.* Kinaston, 1 Ld. Raym. 690; Kiffin *v.* Evans, 4 Mod. 379.

(*m*) Clayton *v.* Kynaston, 2 Salk. 573; Lacy *v.* Kynaston, 1 Ld. Raym. 688, and 2 Salk. 575; Hutton *v.* Eyre, 6 Taunt. 289; Dean *v.* Newhall, 8 T. R. 168; Walmesley *v.* Cooper, 11 Ad. & E. 216; and see Price *v.* Barker, 4 El. & B. 760.

40. Release of one partner is a release of the firm.—A sealed release of one partner discharges his copartners also. Gray *v.* Brown, 22 Ala. 262; Willings *v.* Consequa, Pet. (U. S.) C. C. 307; United States *v.* Thompson, Gilp. (U. S.) 614; Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74; Tudarman *v.* Newball, 17 Mass. 581; American Bank *v.* Doolittle, 14 Pick. (Mass.) 126; Brown *v.* Marsh, 7 Vt. 327; Benson *v.* Kincaid, 3 Pa. St. 57. But not where the instrument otherwise provides. Williams *v.* Hitchings, 10 Lea (Tenn.) 326.

A parol agreement to release one partner does not operate to discharge a debt as against the other. To have that effect it must be under seal. Evans *v.* Carey, 29 Ala. 99; Shotwell *v.* Miller, 1 N. J. L. 181; Walker *v.* McCulloch, 4 Me.

Releases in form held to be covenants not to sue.—If a release is so drawn as to show that it was intended to enure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release.

In Solly *v.* Forbes (*n*) the defendants, Forbes and Ellerman, were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was not a party) that nothing therein contained should affect the plaintiffs' rights against Forbes, either sep-

421; Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Harrison *v.* Clare, 2 Johns. (N. Y.) 449; Rowley *v.* Stoddard, 7 Id. 207; Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37; De Zeng *v.* Bailey, 9 Wend. (N. Y.) 336; Lunt *v.* Stevens, 24 Me. 534.

A partner cannot avail himself of a promise by a creditor of his firm to release him from liability, if he has paid the creditor nothing and has not parted with any security, or acted upon the faith of the promise. Fagg *v.* Hambel, 21 Iowa 140.

In Missouri, the statute (Rev. Stat., § 666) providing that two or more joint or several debtors may be released without discharging the others, applies to copartners. Grant *v.* Holmes, 75 Mo. 109.

The release of a judgment against one of two joint and several debtors, obtained without service of process upon the other, necessarily releases that other, although the converse of the rule would not be true. Coonley *v.* Wood, 36 Hun (N. Y.) 559.

The giving of his individual promissory note, by one of the members of a copartnership, after its dissolution, for a portion of a copartnership debt, is a good consideration for an agreement on the part of the creditor to release and discharge the maker from liability for the debt. Ludington *v.* Bell, 77 N. Y. 138; reversing 43 Super. Ct. 557.

A creditor who has accepted his proportion of an assignment made by a firm, and given the firm a release, has no right of action against a former partner of the firm who retired before the assignment was made, and received from the firm a bond of indemnity against all debts. Bank of Wilmington *v.* Almond, 1 Whart. (Pa.) 169.

Where a judgment is recovered in Pennsylvania against one partner only, on a firm debt contracted in that state, and a release is executed to the other partner in another state, the effect of such release upon the judgment is to be ascertained by reference to the law of Pennsylvania. Greenwald *v.* Kaster, 85 Pa. St. 45.

(*n*) 2 Brod. & B. 38. See, too, Price *v.* Barker, 4 El. & B. 760; Thompson *v.* Lack, 3 C. B. 540; Willis *v.* De Castro, 4 C. B. (N. S.) 216; Bateson *v.* Gosling, L. R., 7 C. P. 9.

arately or as partner with Ellerman, or against the joint estate of the two, and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes or separately, for the purpose of
*238] obtain*ing satisfaction of their debt, either out of the joint estate of the two or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing by them, it was held that this deed was no bar to the action.

Again, in Hartley *v.* Manton,(*o*) where a bill was drawn by a firm on and was accepted by one partner, it was held that a release of the drawers did not discharge the acceptor, the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner.[41]

(*o*) 5 Q. B. 247.

41. What releases are merely covenants not to sue.—Where a creditor releases a surviving partner from liability on a bond and mortgage given by the firm, the estate of the deceased partner is also released from liability on the bond, whatever the intention of the creditor may have been. But as to the mortgage, such estate is not released, as the release is in the nature of a covenant not to sue the surviving partner. Murray *v.* Fox, 39 Hun (N. Y.) 108.

The fact that the consideration paid by one of several partners, upon a compromise made by him, for his release from a debt owing by the firm under the New York act of 1838, authorizing an individual member of a partnership to compromise his individual liability in case of a dissolution, was taken out of the copartnership funds which he had in his hands, will not make such release enure to the benefit of the other members of the firm, or deprive the creditor of the protection of the statute. Stitt *v.* Cass, 4 Barb. (N. Y.) 92.

Illustrations.—The payee of a bill of exchange, drawn by a firm of which he was a member, endorsed the same to his creditor in trust to pay certain other creditors. He afterwards assigned all his property to the endorsee for the benefit of all his creditors, with a stipulation for a release from them. The assignee, in his private capacity, executed such release to the debtor. *Held*, that this did not release his claim upon the other members of the partnership, as endorsee of the bill. Hazelhurst *v.* Pope, 2 Stew. & P. (Ala.) 259.

Where a partnership closed up its business, and all the goods, effects and credits were left with P., one of the partners, for the purpose of paying off the debts, and this partner entered into an agreement with some of the creditors that they should take P.'s notes, endorsed by R., who was not a member of the firm, for forty cents on the dollar of their indebtedness, and the creditors thereupon released to P. all right to resort to any of the goods and effects, and the goods were mortgaged to R. to secure his endorsement, and a covenant was entered into by the creditors not to sue P. for twenty years, and P. and R. afterwards disposed of the goods—it was held that the other partners were liable to the creditors to the amount of

Recitals of releases.—In construing releases, particular attention must be paid to the recitals; for, however general the operative words of the deeds may be, they will be confined so as not to effect more than the parties appear, from the deed itself, to have contemplated. (*p*)

Removing seal.—If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged; but if the obligors are only bound severally, then the removal of the seal of one of them does not affect the liability of the others. (*q*)

Arrest.—Before arrest for debt was abolished (as it now is except in a few special cases), an arrest of a debtor, followed by a discharge of him by the arresting creditor, was equivalent to a release by the creditor of his debt; whence it followed that if a creditor of a firm obtained judgment against it and arrested the partners and then let one of them go, the others were entitled to be discharged from custody. (*r*)

Composition in bankruptcy.—If a creditor accepts a composition in bankruptcy in respect of a joint debt, he is not precluded from suing one of the debtors who may be separately liable to him in respect of the same debt. (*s*)

**Receipt in full.*—A receipt given to one partner in satisfaction of all demands against him will not discharge his copartners unless that also was intended. (*t*) [*239

the partnership indebtedness to them, less the notes for forty per cent. Roberts *v.* Strang, 38 Ala. 566.

The plaintiff and defendant were partners, and the defendant, having received money on the partnership account, mingled it with money held by him and A in trust, and allowed it to pass into A's hands. The plaintiff afterwards, having been wrongfully kept in ignorance by the defendant of the receipt and disposition of the money, released A. *Held*, that the defendant was accountable to plaintiff for the money so received, notwithstanding the release to A. Mumford *v.* Murray, 6 Johns. (N. Y.) Ch. 452.

(*p*) See, for illustration of this rule, Lindo *v.* Lindo, 1 Beav. 496; Payler *v.* Homersham, 4 Man. & S. 423; Simons *v.* Johnson, 3 Barn. & Ad. 175; Boyes *v.* Bluck, 13 C. B. 652; Lampon *v.* Corke, 5 B. & A. 606.

(*q*) See Collins *v.* Prosser, 1 Barn. & C. 682.

(*r*) Ballam *v.* Price, 2 Moo. 235.

(*s*) Simpson *v.* Henning, L. R., 10 Q. B. 406; Megrath *v.* Gray, L. R., 9 C. P. 216. Wilson *v.* Lloyd, 16 Eq. 60, *contra*, must be considered as overruled on this point; Cragoe *v.* Jones, L. R., 8 Ex. 81, was a case of a surety.

(*t*) Ex parte Good, 5 Ch. D. 46, where

3. *Substitution of debtors and securities.*

A liability which is originally joint, or joint and several, may be extinguished by being replaced by a liability of a different nature; and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable; (*u*) or by virtue of the doctrine of merger, independently of any such agreement.

(a) *Of substitution by agreement.*

Extinction of liability by substitution of debtors.—In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A, being indebted to B, transfers his liability to C, and B does not assent to the transfer, his rights are wholly unaffected, he will neither acquire any right against C nor lose his former right against A. As regards B, the agreement between A and C is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B assents to the arrangement come to between A and C, and adopts C as his debtor instead of A, then A's liability to B is at an end, and B must look for payment to C, and to him alone. (*x*)[42]

one partner was a nominal partner, and not, therefore, liable to indemnify the others.

(*u*) Sometimes called "novation," but nothing is really gained by using this word. See, as to this word, 1 Ch. D. 322, per James, L. J.

(*x*) See, per Buller, J., in Tatlock *v.* Harris, 3 T. R. 180.

42. Substitution of debtors by agreement.—Where one partner sells his share in the partnership stock to a stranger, and receives payment therefor, and the purchaser becomes a partner in the concern, such purchase and payment will not have the effect to relieve the share of the stock of the remaining partner from liability for the debts of the old firm. Nixdorf *v.* Smith, 16 Pet. (U. S.) 132.

Where a creditor of the firm sues a retiring partner, the burden of proof is on the defendant to show his discharge, either by express agreement or by facts from which such agreement may be implied. Hall *v.* Jones, 56 Ala. 493. But such agreement need not be made in writing. Hopkins *v.* Carr, 31 Ind. 260; Schwindler *v.* Euell, 45 How. (N. Y.) Pr. 33.

The introduction into the firm of a new member is a dissolution of the firm. Hatchett *v.* Blanton, 72 Ala. 423.

Whether the assumption, by an in-

Agreement between partners does not affect creditors.—To apply this to cases of partnership, let it be supposed that a firm of three members, A, B and C, is indebted to D; that A retires, and B and

solvent firm, of the individual debts of a retiring partner can in any case be valid, and as to the proof required to show good faith and a sufficient consideration, see Keith *v.* Fink, 47 Ill. 272.

Under Stat. 1865, ch. 113, a creditor's proof of his claim and acceptance of a dividend, under an order distributing, among the joint and several creditors alike, the estate in insolvency of a partner who, on the dissolution, had agreed to pay the partnership's outstanding debts, bars any right of action on the debt against the other partner, although, after the dissolution, he has changed his domicile to the creditor's state. Bucklin *v.* Bucklin, 97 Mass. 256.

Where a partnership is dissolved, and the partner continuing the business assumes the liabilities of the firm, and publishes notice that he will pay them, the other partners are nevertheless liable to a creditor who did not present his claim in the manner directed by the notice. Umburger *v.* Plume, 26 Barb. (N. Y.) 461.

Illustrations.—On the dissolution of a partnership, it was agreed between the partners that one of them should assume and pay the partnership debts. A creditor, on being afterwards informed of the arrangement, replied that he was satisfied with it. *Held*, that such reply was not such evidence as would warrant the jury in finding that he had discharged the other partner. Chase *v.* Vaughan, 30 Me. 412.

A and B dissolved partnership, and by the agreement of dissolution A was to pay the debts of the concern. C, a creditor of the firm, assented to this arrangement, and promised to give up the partnership note and take that of A alone, but this was not done. *Held*, that B was not released. Frentress *v.* Markle, 2 Gr. (Iowa) 553.

In an action by a surviving partner, where the declaration contained the usual common counts, in the form prescribed by the act of 1856, ch. 112, and a special count on an agreement, the evidence consisted of accounts between the original firm of the plaintiff and its successors acting as agents of the defendant and the defendant, and the written agreement. *Held*, that the accounts should not be excluded on the ground that the plaintiff must prove an acknowledgment of indebtedness on the part of the defendant; and that it was competent for the jury to find, from the facts proved, whether there was an assignment or transfer of the accounts from the old firm to the new, and whether the defendant assented to it, and promised, expressly or impliedly, to pay the balance to the plaintiff. Stewart *v.* Rogers, 19 Md. 98.

Where, after the dissolution of a partnership between W. & C., a creditor of the firm stated an account in which they were charged with certain goods purchased by them, and at the same time stated a separate account of his dealings with W., who had assumed the adjustment of the partnership concerns, in which account W. alone was charged with another partnership debt, it was held that C. was not discharged from such other partnership debt thereby; but that, whether he was discharged or not, no one but C. could avail himself thereof; and a note given by C., either by way of security or satis-

*240] C, either alone or together with a *new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, B and C is not affected by the above arrangement, and A does not cease to be liable to him for the debt in question. (*y*) But if, after A's retirement, D accepts as his sole debtors B and C, or B, C and E (if E enters into the firm), then A's liability will have ceased and D must look for payment to B and C, or to B, C and E, as the case may be. When, therefore, a

faction of such debt, would be founded on a good consideration. Averill *v.* Lyman, 18 Pick. (Mass.) 346.

A, of London, gave a letter of credit to B & C, of Boston (partners in a shipment), who thereupon drew bills on A, which he accepted and paid. B had other accounts with A, in which C had no concern; C had funds in the hands of B, and requested B to remit to A and close the account of B & C. B afterwards made a remittance to A, and advised him by letter of other forthcoming remittances, and requested him to apply the sum which was actually remitted to B's account generally, and place the bills which A had accepted and paid for B & C to B's debit. This letter was shown to C before it was forwarded to A. A replied that he had received B's letter and "noted the contents." This letter was also shown to C. Before this letter was received, B failed, being largely indebted to C; and in about seventy days after the letter was written, A suspended payment, not having, in his correspondence, again alluded to B's request to debit him with the bills accepted and paid for B & C. About four and a half months after said letter was written, A forwarded his account against B & C, and it was put in suit. *Held*, that A had not, by the terms of his letter to B, agreed to discharge C, and look for payment to B alone; that there was no consideration for such agreement, if it had been made; and that A was entitled to recover of B & C. Wildes *v.* Fessenden, 4 Metc. (Mass.) 12.

A & B, as copartners, gave a note to C, and afterwards the copartnership was dissolved, B agreeing to pay all the debts, and B and C formed a copartnership. *Held*, that this did not operate as an extinguishment of the note, unless it was so expressly agreed between B and C at the time their copartnership was formed, and although it was alleged that this note was to form a part of C's stock in the firm. Mitchell *v.* Dobson, 7 Ired. (N. C.) Eq. 34.

A judgment was confessed by D, in favor of a firm consisting of A, B and C, to secure future advances. Three years afterwards C withdrew from the firm, A and B purchasing his interest. The new firm continued to make advances, charging them and giving credit for payments, &c., as before, no change being made in the books. The judgment was entered up by A and B, and was the first lien on D's land. *Held*, that the judgment secured the advances made by the old and the new firm. Shenk's Appeal, 33 Pa. St. 371.

(*y*) Smith *v.* Jameson, 5 T. R. 601; Rodgers *v.* Maw, 4 Dowl. & L 66; Dickenson *v.* Lockyer, 4 Ves. 36; Cummins *v.* Cummins, 8 Ir. Eq. 723.

partner has retired and a creditor of the firm continues to deal with the continuing partner and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue.[43]

Liability not got rid of by transferring share.—Nothing used to be more common than for promoters of companies to put forward a prospectus in which it was said that all liability on the part of a shareholder would cease on a transfer of his share, but the hope thus held out was as false and delusive as that intended to be raised

43. Agreement between partners does not affect creditors.—Equities between the partners do not affect creditors of the firm. Bartles *v.* His Creditors, 11 La. Ann. 432.

A mere change in the name or style of the firm does not affect its rights or liabilities. Gills *v.* Ferris, 82 Mo. 156.

Where, on the retirement of one partner, the others agree with him to pay a firm debt, which is known to the creditor, the retiring partner will be deemed, in law, a surety as to that debt. Williams *v.* Boyd, 75 Ind. 286.

An agreement by an incoming partner to pay the firm debts in consideration of an interest in the firm, is not within the statute of frauds, and may be enforced by creditors who were total strangers to the agreement. Poole *v.* Hintrager, 60 Iowa 180.

Where it was agreed between a retiring partner and his copartners, who were to continue the business, that the latter should assume the old firm's debts, and take all their assets, to be used in paying those debts, the agreement constituted the new firm trustees of the assets for the benefit of the creditors of the old firm, and the interest of the new firm and their creditors is confined to what remains, if anything, after payment of those debts. Bowman *v.* Spalding (Ky.), 2 S. W. Rep. 911.

Where two partners, having ordered a piece of work done under contract, dissolve partnership, an agreement between one of them and the contractor that such last-mentioned partner should be discharged from his liability for the work already done, is void for want of consideration, the other partner not having promised to assume such liability. It would be otherwise if the other partner did so promise, one debt being substituted, in that case, for the other. Collyer *v.* Moulton, 9 R. I. 90.

Where, upon the dissolution of a copartnership, one partner assumes a liability, he does it *prima facie*, upon sufficient consideration, leaving his copartners liable only as sureties; and they may take measures to have the claim assigned and collected, from the partner liable. Ætna Ins. Co. *v.* Peck, 28 Vt. 93.

As to the liability of a retiring partner, to one whom he has notified to "go and get his money" from the continuing partner, see Maier *v.* Canavan, 8 Daly (N. Y.) 272.

by the assertion that the liability of the shareholders would be limited to the amount of their shares. (*z*) It cannot be too often repeated that merely by retiring, a partner or a shareholder gets rid of no liability as to past transactions, unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues and always must continue." (*a*) [44]

(*z*) See Blundell *v.* Winsor, 8 Sim. 613.

(*a*) Wood *v.* Braddick, 1 Taunt. 104. Therefore, partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See Hoby *v.* Roebuck, 7 Taunt. 157; Graham *v.* Whichelo, 1 Cromp. & M. 188.

44. **Liability not got rid of by transferring share.**—A relinquishment by one ostensible partner to another, of all his interest in the partnership, does not discharge him from liability as a partner to third persons, who afterwards deal with the company without notice of such relinquishment. Grady *v.* Robinson, 28 Ala. 289. But the sale of one partner's interest to an outsider, or any other admission of the new partner into the firm, works a dissolution. McCall *v.* Moss, 112 Ill. 493.

Where a partner having sold his interest permits his name to remain in the firm in consideration of an agreement on the part of the purchaser to pay the firm debts, such retiring partner is liable on a note given by one of his former partners, in the old firm name, to one who has no notice of the change in the firm. Gammon *v.* Huse, 100 Ill. 234.

The retirement of one of the members of a partnership, with the consent of the payee of a note previously executed by the firm, and his transfer of his interest to the other partners, who assume the firm debts, does not discharge the retiring partner from liability on the note. Clark *v.* Billings, 59 Ind. 508.

In a suit on a note made by one of the partners, the fact that one member of the firm had transferred all his interest to his copartners may be shown, as tending to prove a dissolution. Waller *v.* Davis, 59 Iowa 103.

Members of a copartnership association who have assigned their interest therein to other solvent parties, with the assent of their copartners, and who accept such assignees as copartners in their stead, and recognize and treat them as such, as between themselves, are not liable for the debts of the copartnership existing at the time of such assignment, and they cannot be required to contribute for their payment to those continuing partners who have been required to pay the same. Savage *v.* Putnam, 32 N. Y. 501.

If a partner, after a dissolution of the partnership, assign all his interest in the partnership property for a valuable consideration, and take a covenant of indemnity against all liability for the debts of the partnership, the covenant

The cases which bear upon the question of discharge by virtue of a substitution, by a creditor, of one debtor for another *will be found, notwithstanding some conflict between them, to [*241 be all professedly based on the foregoing principles and on a few simple rules, the most important of which are as follows:

1. *Creditors not presumed to discharge outgoing partners.*—There is no *a priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability. (*b*) [45]

2. *Creditor may agree to look only to continuing partners.*—An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them and look only to the others, is not necessarily invalid for want of consideration. (*c*) [46]

does not cover a debt which does not appear upon the partnership books, and was not made known to the assignee at the time of the contract of indemnity. Case *v.* Cushman, 3 Watts & S. (Pa.) 544.

(*b*) Such an agreement must be proved. See Benson *v.* Hatfield, 4 Hare 37.

45. **Creditors not presumed to discharge outgoing partners.**—A creditor who takes the promissory note of a new firm in payment of a debt due him from the old firm, in ignorance of the dissolution and supposing the note to be that of the old firm, may sue on the original indebtedness without showing that he was fraudulently induced to take the note. Buxton *v.* Edwards, 134 Mass. 567.

(*c*) Lyth *v.* Ault, 7 Ex. 669.

46. **Creditor may agree to look only to continuing partners.**—Partners cannot by any agreement affect the rights of creditors. But where, after the dissolution of the partnership, a creditor takes the individual note of one partner for a partnership debt, he cannot afterwards hold the other partners responsible. Harris *v.* Lindsay, 4 Wash. (U. S.) 98; Id. 271.

A promise by a creditor of the firm, made without consideration to release the retiring partner from liability, is *nudum pactum* and not binding. Eagle Manufacturing Co. *v.* Jennings, 29 Kan. 65; S. C., 44 Am. Rep. 668; Walstrom *v.* Hopkins, 113 Pa. St. 118.

A retiring partner may be discharged from the debts of the partnership by the acceptance, by the creditor, of new notes of the other partners, as renewals of the notes first given, provided the creditor agrees to discharge him by the acceptance of such new notes, which is a question for the jury; but where the new notes are signed like those first given, and the creditor is ignorant of any change in the partnership, no agreement to discharge can be inferred. Bernard *v.* Torrance, 5 Gill & J. (Md.) 383.

Where, after dissolution, a firm creditor, with knowledge of an agreement between the partners that some of them should assume and pay the debts of the firm, takes the negotiable paper of the latter in payment of his debt, this will discharge the other partners. Millerd *v.* Thorn, 56 N. Y. 402; Stone *v.* Chamberlain, 20 Ga. 259; Hoopers *v.* McCan, 19 La. Ann. 201.

3. *Effect of doctrine that a release of one partner is a release of all.*—Except under special circumstances, a creditor who releases one partner discharges all. (*d*) Consequently, if a creditor discharges a retired partner, and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether.

Classification of cases.—It is proposed now to examine the cases relating to the liability of retired partners for debts incurred before their retirement. They may be conveniently classified thus:

A. Cases in which a retired partner has not been discharged.
   (*a*) No new partner having been introduced into the firm.
   (*b*) Although a new partner has been introduced into the firm.
B. Cases in which a retired partner has been discharged.

After these cases have been examined, the analogous cases relating to the discharge of the estate of a deceased partner will be noticed.

*242] *CLASS A (*a*).—CASES IN WHICH A RETIRED PARTNER HAS NOT BEEN DISCHARGED, NO NEW PARTNER HAVING BEEN INTRODUCED INTO THE FIRM.

Promise to look only to continuing partners.—The strongest cases of this class are Lodge *v.* Dicas (*e*) and David *v.* Ellice. (*f*) In each of these a partnership had been dissolved, one member retiring and the other continuing the business and agreeing to pay the debts

Where, after dissolution, the holder of a firm note accepts the note of one of the firm payable at a future date, retaining interest by way of discount, and agreeing to release the other partner, this is a payment of the firm note. Athens Bank *v.* Green, 40 Ohio St. 431.

What is sufficient evidence to show an agreement on the part of a creditor to accept the liability of a new firm, for the debts of the old firm, so as to estop him from maintaining his claim against the outgoing partners, see Regester *v.* Body, 19 Blatchf. (U. S.) 79.

(*d*) *Ante* p. *237.

(*e*) 3 B. & A. 611.

(*f*) 5 Barn. & C. 196, and 1 Car. & P. 369.

of the old firm. In each case the plaintiff knew of the arrangement, and his debt was transferred, with his consent, to the books of the new firm. In each case, moreover, there was strong evidence to show that the plaintiff had agreed to discharge the retired member and to look only to the others. But in each case it was held that the retired partner continued liable and that the plaintiff had done nothing to discharge him; and the fact that no person had become liable to the plaintiff, who was not so originally, was relied upon by the court as showing that there was no consideration for the alleged discharge. (*g*)

Observations on these cases.—These two cases have been much criticised, (*h*) and they certainly went too far, for the proposition that a creditor of a firm cannot, for want of consideration, abandon his right against a retiring partner and retain it against the others, unless they give some fresh security, has been shown to be erroneous and is now exploded; (*i*) and there can be little doubt that if similar cases were to arise again and the jury found for the defendant, the verdict would not be disturbed.

This appears from Thompson *v.* Percival. (*k*) In that case the defendants, Charles Percival and James Percival, had, as partners, become indebted to the plaintiff. The partnership was dissolved, and it was agreed that the business should be carried on by James, and that he should receive and pay all debts, and assets sufficient to pay debts of the firm were left in his hands. The plaintiff, on applying to James for pay*ment was told that he must look to him, James, alone, and the plaintiff accordingly drew a [*243 bill on James and the bill was accepted by him. The bill being afterwards dishonored, the plaintiff sued both James and Charles for the original debt and obtained a verdict for the full amount; but the defendants had leave to move for a nonsuit if the court should be of opinion that Charles had been discharged. The court, without deciding that point, held that the question ought to have been left to the jury, and a new trial was therefore directed. The court held that the facts proved raised a question for the jury

(*g*) See, too, Thomas *v.* Shillibeer, 1 M. 623; 2 Mees. & W. 493.
Mees. & W. 124.
(*h*) See 5 B. & Ad. 933; 2 Cromp. &
(*i*) *Ante* p. *241, note (*c*).
(*k*) 5 B. & Ad. 925.

whether it was agreed between the plaintiff and James that the former should accept the latter as his sole debtor, and should take the bill of exchange accepted by him alone by way of satisfaction for the debt due from both. If it was so agreed, the court thought that the agreement and receipt of the bill would be a good answer on the part of Charles by way of accord and satisfaction. (*l*)

It is not unusual to represent Lodge *v.* Dicas and David *v.* Ellice as altogether overruled by Thompson *v.* Percival and other cases. This, however, is not quite correct. The three cases together establish (1) that a creditor who treats the continuing partners as his debtors does not necessarily abandon his right to resort to a retired partner for payment; (2) that whether he does or does not is a mixed question of law and fact which ought to be submitted to a jury; and (3) that their verdict will not be disturbed by the court upon the grounds acted on in Lodge *v.* Dicas and David *v.* Ellice.

Treating continuing partners as debtors.—That a creditor who treats the continuing partners as his debtors does not, without more, discharge a retired partner, is shown by other cases, and especially by those in which the continuing partners have paid interest on the old debt at a rate or in a manner differently from that previously adopted.

An old case on this head, and one often referred to, is Heath *v.* Percival, (*m*) in which two partners, indebted to the plaintiff on a bond, dissolved partnership. One of them continued to *carry on the
*244] business, and took upon himself the partnership debts, and public notice was given that the creditors of the firm were either to come in and be paid their debts or to look for payment to the continuing partner only. The plaintiff came in, but instead of being paid off, he kept the bond, receiving interest at six per cent. instead of five per cent. It was held that he did not thereby discharge the retired partner from his liability to pay the bond with interest at five per cent.[47]

(*l*) In Evans *v.* Drummond, 4 Esp. 89, and Reed *v.* White, 5 Id. 122, a retiring partner was held discharged on the ground here referred to. See *post* p. *247.

(*m*) 1 P. Wms. 682, and 1 Str. 403.

47. Treating continuing partners as debtors.—A note given in the firm name, after dissolution, for a firm debt, by a partner without authority to give it, will not extinguish the firm debt though both the creditor and the part-

Taking a new security from them.—Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that

ners believed it would have that effect. Gardner *v.* Conn, 34 Ohio St. 187. And see Turnbow *v.* Broach, 12 Bush (Ky.) 455.

In Winter *v.* Innes (4 Myl. & C. 101, 108, 109) Lord Cottenham said: "The question, therefore, is whether a creditor of a firm, who, knowing of the death of one of the firm, continues to deal, as before, with the survivor for any length of time, without requiring payment of the balance due to him from the firm at the time of the death, thereby loses the remedy which he had in equity against the estate of the deceased partner, particularly in a case in which there is not only no evidence of any intention to abandon such claim, and to adopt the individual responsibility of the surviving partner in its stead, but the total absence of any object or consideration for so doing, and conclusive evidence that the principal object of the forbearance was not to press upon or prejudice the estate of the deceased, of whose will the creditor was himself a trustee and executor, though he did not prove. It would, I think, be extraordinary if there were authorities to be found in support of the affirmative of this proposition. I will shortly refer to some of the principal cases at law and in equity which bear upon this subject. The cases at law have necessarily arisen where the dissolution of the partnership has taken place by arrangement between the partners, and not by death. It will be found that in some, even where it was clear that the creditor intended to take the separate security of the continuing partner in lieu of the joint liability of the dissolved firm, the retired partner was held not to be discharged, as in David *v.* Ellice and Lodge *v.* Dicas, in which the creditor, with a knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt; but it was held that he had not thereby released the retiring partner, upon the ground of want of consideration for his so doing. These decisions have been considered as carrying the doctrine very far, and undoubtedly they do; and the true ground appears to me to have been acted upon in Bedford *v.* Deakin, and Thompson *v.* Percival. In the former it is laid down that to discharge the retiring partner it must appear that the creditor accepted the separate security of the continuing partner in discharge of the joint debt; and in the latter case, although the creditor knew that the continuing partner had agreed to pay all debts, and with that knowledge had taken a bill from him, for the payment of which, when due, he afterwards allowed two months, yet the court, upon a motion for a new trial, ordered it, that it might be put to the jury whether the plaintiff had agreed to take, and did take, the bill in satisfaction of the joint debt. If, therefore, the cases in equity of claims against the estates of deceased partners are to be regulated by the same principle, there can be no doubt of the right conclusion in the present case, for there was no new security given, and instead of an intention appearing, or any agreement being proved, to release the estate of Mr. Winter, all the evidence proves directly the reverse.

such should be the case, or unless the new security is of such a nature as to merge the original debt. In Bedford *v.* Deakin (*n*) three partners were indebted to the plaintiff on bills of exchange. They dissolved partnership and arranged between themselves that one of them should pay the plaintiff. The plaintiff was informed of this arrangement and took from one of the partners his separate promissory note, endorsed by a third party, for the amount of the debt, but expressly reserved his right to look to all three partners for payment, and the plaintiff retained the bills already in his possession. The notes, when due, were taken up by other bills, and they in their turn were several times renewed. Ultimately the plaintiff sued all the three partners on the original bills, and he

It cannot be disputed now that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors. When, and by what means, is that liability to terminate? Sir William Grant, in Vulliamy *v.* Noble (and he had much considered the question in Sleech's Case in Devaynes *v.* Noble), has answered the question. He says: 'The deceased partner's estate must remain liable in equity until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be before his liability ceases.' The discharge may be by direct payment, or by dealings with the continuing partner operating as payment of the joint debt, or, in the terms of Thompson *v.* Percival, the dealings may arise from the creditors having agreed to take, and taking, the security of the survivor in satisfaction of the joint debt; or there may be an equitable bar to the remedy, for (as Lord Eldon expresses it in Ex parte Kendall): 'As the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand.' In the present case there is a total absence of any such equitable defence to the claim upon the estate of Mr. Winter, as there is of any intention or contract to abandon it. The more modern cases of Cowell *v.* Sikes, Wilkinson *v.* Henderson, and Braithwaite *v.* Britain, in addition to the former authorities, leave no doubt that in this case nothing has taken place which can bar Mr. Baillie's claim (admitted to have at one time existed) to compel payment of so much of the debt due to him from the firm as remains unpaid."

(*n*) 2 B. & A. 210. See, too, Swire *v.* Redman, 1 Q. B. D. 536, where the plaintiff had not expressly reserved his rights against the retired partner. See, also, Featherstone *v.* Hunt, 1 Barn. & C. 113; Spenceley *v.* Greenwood, 1 Fost. & F. 297. Compare Evans *v.* Drummond, 4 Esp. 89, noticed *infra*, p. *247.

was held entitled so to do, never having discharged any of them, either intentionally or otherwise.[48]

48. Taking a new security from continuing partners.—A note given by one partner after dissolution, for a debt of the firm, is not an extinguishment or satisfaction of the original debt, so as to discharge the other partner, unless such was the agreement when the note was given; and this is a fact for the determination of a jury. Mason *v.* Wickersham, 4 Watts & S. (Pa.) 100; Bernard *v.* Torrance, 5 Gill & J. (Md.) 383; Davis' Estate *v.* Desauque, 5 Whart. (Pa.) 530; Leabo *v.* Goode, 67 Mo. 126; Folk *v.* Wilson, 21 Md. 538. See, also, Tyner *v.* Stoops, 11 Ind. 22; Bowyer *v.* Knapp, 15 W. Va. 278; In re Parker, 19 Bank. Reg. 340; Hill *v.* Marcy, 49 N. H. 265; Townsends *v.* Stevenson, 4 Rich. (S. C.) 59; Landolfo *v.* Appleton, 40 N. Y. 533. The rule is the same, even though such note is signed by a surety. Varnell *v.* Anderson, 14 Miss. 619.

Where a firm consists of one active and one or more dormant partners, and a note is given, the taking of a renewal of such note from the active partner, after dissolution, and without any intent to discharge the dormant partners, does not release the firm from the original claim. Parker *v.* Canfield, 37 Conn. 250.

Where a creditor of the former partnership drew on those persons who continued the social style of the late firm, for account of a balance due him by the former partnership, and his drafts were protested for non-payment, and paid by the drawer *supra protest*, a member of the former partnership, who is sued for such balance, cannot maintain that there was a novation of the debt. The drafts are to be held as having been drawn on his agents by his authority. Skannel *v.* Taylor, 12 La. Ann. 773.

Where a partnership was dissolved and a new firm was formed, consisting in part of the same members, a creditor of the old firm with notice of the dissolution, taking, in liquidation of his claim, drafts of the old firm upon the new, accepted by the latter and drawn by a member of both, cannot, upon failure of the new firm, claim payment of the members of the old, unless he can show their assent to the making of the drafts. Paterson *v.* Camden, 25 Mo. 13.

Illustrations.—A drew a bill on B, C & Co., which was accepted, and by him negotiated to a bank. At maturity the draft was paid by a like bill drawn on B alone, the firm in the meantime having been dissolved, which last bill A, as endorser, was compelled to take up. *Held*, that he could not maintain an action against the firm to reimburse the amount thus paid. Springer *v.* Shirley, 11 Me. 204.

The firm of F. & S. having dissolved, a creditor refused to accept the note of S. and thereby discharge F. *Held*, that his receiving and retaining what purported to be a note of the late firm of F. & S., without knowledge that it was signed by S. alone, without authority, in the firm name, will not discharge F., the creditor not having unduly delayed in enforcing this claim. Adler *v.* Foster, 39 Mich. 87.

A & B, being partners, purchased goods of C for the partnership, and gave each his separate note, with his separate surety, for a moiety of such goods. A afterwards went out of the concern, and B agreed to pay both notes. A's was therefore canceled, and B gave a new note, with the surety who was on his

Liability same in equity as at law.—Nor was there any difference, in such cases as these, between the liability of a retired partner at law and in equity. In Oakford *v.* European and American Steamship Company, (*o*) a partner retired, and the continuing partners indemnified him against all claims that might be made against him as a member of the firm. Disputes afterwards arose between the continuing partners and a company respecting a contract entered into before the retirement. These disputes were *partly adjusted. Those unadjusted were referred to arbitration, pursuant to a clause in the contract. The reference was afterwards revoked, and an action upon the contract was then brought against the continuing partners and the retired partner. The retired partner sought to have this action restrained by injunction, upon the ground that his retirement and indemnity had placed him in the position of a surety only for the due performance of the contract, and that what had taken place since the retirement, which was known to the company, had discharged him. But it was held that his liability continued, and his bill was dismissed, with costs. [*245

Position of dormant partners.—The principle of the above cases applies to *dormant* partners even more strongly than to others, for a creditor who has a security of which he is unaware, cannot intentionally give up that security. Therefore, if A and B are partners, and the two become indebted to a creditor who knows only of A, and then B, the dormant partner, retires, no dealings between the creditor and A will discharge B from his liability to be sued when discovered, unless those dealings extinguish the original debt, not only as against B, but also as against A. (*p*)

other note. Subsequently, B, failing to pay these debts, received the surety on his note into partnership in the business, and entered into articles of agreement with him, by which the surety was to receive all debts due to B and the former partnership, and all produce taken in discharge of debts; and the surety agreed to appropriate the same to the payment of the "debt originally contracted by A & B with" C. *Held*, that this applied to both the original notes and the note substituted for A's. Gordon *v.* Joslin, 4 Hayw. (Tenn.) 115.

(*o*) 1 Hem. & M. 182.

(*p*) Robinson *v.* Wilkinson, 3 Price 538.

CLASS A (*b*).—CASES IN WHICH A RETIRED PARTNER HAS NOT BEEN DISCHARGED, ALTHOUGH A NEW PARTNER HAS BEEN INTRODUCED INTO THE FIRM.

Effect of introduction of new partner on the liability of a retired partner.—The introduction of a new partner has no effect on the liability of a retired partner, unless the liability of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. This, moreover, he cannot do by virtue of any agreement between the partners themselves; and even if the new firm adopts the old debt and pays interest on it, this is *prima facie* only in pursuance of some agreement between the partners themselves, and a creditor who does no more than allow the partners to carry out that agreement does not debar himself of his right to look for payment to those originally indebted to him.

*246] *A leading case on this head is Kirwan *v.* Kirwan.(*q*) There, three partners, C., M. and N., were indebted to the plaintiff. C. retired, and M. and N. continued in partnership together, and agreed to discharge the debts of the old firm. M. afterwards retired, and N. took in a new partner. The plaintiff's account was transferred from the books of the old to the books of the new partnership, and interest was paid, and accounts were rendered to him as before. The plaintiff was informed of the dissolution, and had stated to one of the retired partners that he was aware he had no further claim upon him. But it was held that the three original partners remained liable, as there was nothing to show that the security of the new firm had been substituted for that of the old, and the statement above referred to could not be regarded as an agreement to discharge the retired partner.

In Gough *v.* Davies(*r*) three persons were partners as bankers, and were indebted to the plaintiff. One of the partners retired; a new partnership was formed between the continuing partners and other persons; the plaintiff's debt was transferred to the books of the new firm, and he assented to such transfer. Moreover, the

(*q*) 2 Cromp. & M. 617. (*r*) 4 Price 200.

plaintiff continued to deposit money with the new firm, and was paid by it interest on the old debt and new deposits, as if they all formed one debt. But it was held that there was nothing in all this to show any agreement by the plaintiff to discharge the retired partner, and he was consequently held liable for the old debt.

Blew *v.* Wyatt(*s*) is another case to the same effect. A clerk lent money to his employers, who were in partnership as brewers, and took an acknowledgment for it. Several changes took place in the firm, one of the original partners retiring and other persons from time to time coming in and going out. The clerk remained in the employ of the firm notwithstanding these changes, and was aware of them, and was always paid interest by the firm for the time being. He was nevertheless held entitled to sue the two original partners for the money he had lent them.

Right to sue new firm not inconsistent with right to sue the old firm.—Whether, in these cases of Kirwan *v.* Kirwan, Gough *v.* *Davies and Blew *v.* Wyatt, the creditor could have sued the new firm may perhaps be open to doubt.(*t*) If he could not, it would be absurd to contend that the liability of the new firm was substituted for that of the old; whilst if he could, the evidence was not sufficient to show an intention on his part to deprive himself of the security afforded by the undoubted liability of the original firm before any change in it took place. It by no means follows that a creditor who assents to an arrangement by which a new person becomes liable to him, consents to abandon his hold on another person clearly liable to him already; and unless a substitution of liability can be established, the old liability remains.(*u*)[49] [*247

(*s*) 5 Car. & P. 397.

(*t*) See per Bolland, B., 2 Cromp. & M. 628; Daniel *v.* Cross, 3 Ves. 277; Furgusson *v.* Fyffe, 8 Cl. & F. 121.

(*u*) See Harris *v.* Farwell, 15 Beav. 31.

49. What will not discharge retiring partner, although a new partner has entered the firm.—Where the consignor of goods to a firm, being notified of its dissolution, and of the turning over of part of the goods to the new firm, instructs the latter to sell the goods and remit the proceeds, this, in the absence of explanation, will discharge the old firm from liability as to the goods so turned over, but not for the balance of the consignment. Hall *v.* Jones, 56 Ala. 493.

Where a partnership was dissolved, and a new firm was formed, including, with one exception, the members of the

CLASS B.—CASES IN WHICH A RETIRED PARTNER HAS BEEN DISCHARGED.

In all these cases it will be found that the court or a jury has come to the conclusion that the creditor has in fact, either expressly or impliedly from his course of dealing with the continuing partners, adopted them as his sole debtors, and thereby in fact discharged the retired partner.(*x*)

Retired partner may be discharged though no new partner comes in.—That a retired partner *may* be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm, is clear from the case of Thompson *v.* Percival,(*y*) already noticed.

In Evans *v.* Drummond(*z*) a firm of two partners gave a partnership bill for goods supplied them. One of the partners retired, and the bill when due was not paid, but was renewed by another bill given by the partner who continued the business. The creditor took this bill knowing of the change in the firm. Lord Kenyon held that by so doing the creditor had relied on the sole security
*248] of the continuing partner, and had dis*charged the other. Reed *v.* White(*a*) is a similar case and to the same effect.

Effect of introduction of new partner.—The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become

former concern, it was held that as between the latter firm and the retiring partner, it would not be presumed that debts of the latter firm were contracted for payment of debts of the former one. Chaffin *v.* Chaffin, 2 Dev. & B. (N. C.) Eq. 255.

A firm of two partners dissolved, organizing again with the addition of a third partner. The new firm gave a trust deed of property acquired by money contributed by the incoming partner, to secure money due from both firms to a bank, the understanding being that the new partner's interest should be applied to secure the indebtedness of the new firm only. *Held*, that equity would enforce this intention for the benefit of the creditors of the new firm. Day *v.* Wetherly, 29 Wis. 363. S. P., Smith *v.* Peters, 20 How. (N. Y.) Pr. 121.

(*x*) Mr. Pollock says, truly, that there is nothing to prevent a firm from stipulating with any creditor that he shall look only to the members of the firm for the time being. Dig. (3d ed.) 30. See Hort's Case and Grain's Case, 1 Ch. D. 307.

(*y*) 5 B. & Ad. 925; *ante* p. *242.

(*z*) 4 Esp. 89. Compare Bedford *v.* Deakin, 2 B. & A. 210, noticed *ante* p. *244.

(*a*) 5 Esp. 122.

liable to the creditor in respect of the debt in question.(*b*) But this is not necessarily conclusive, for there may be circumstances showing that such was not the intention of the parties.(*c*) At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner.(*d*)

In Hart *v.* Alexander(*e*) the plaintiff, an officer in the East India Company's service, had, in 1813, opened an account with the house of Alexander & Co., of Calcutta, which failed in 1832. The defendant retired from the firm in 1822, when a new partner was introduced, and since that time other changes had taken place, some of the old partners retiring and new ones coming in. The defendant's retirement was advertised, and there was evidence to show that the plaintiff was aware of the fact. The new firms from time to time accounted with the plaintiff and paid him interest, sometimes at one rate and sometimes at another. On the bankruptcy of the firm in 1832, the plaintiff proved the amount of his debt against its joint estate. The plaintiff afterwards sued the defendant, and the case was tried before Lord Abinger, who is reported to have said to the jury:

"To ask you if there was an agreement by the plaintiff to discharge the defendant, is to put the case upon a false issue, the agreement, if any, being an agreement raised by construction of law; the true question being whether the plaintiff did not go on dealing with the new firm, and making up fresh accounts with them, so as to discharge the defendant. I take the law to be this: Where a debtor who is a partner in a firm leaves that firm, and any person trading with the firm has notice of it, and he goes on dealing *with the firm and [*249 making fresh contracts, that discharges the retiring partner, though no new partner comes in. So it is if the creditor draws for part of his balance and sends in more goods; so, if the creditor strike a fresh balance with the new partners for a different rate of interest; so, if a new partner comes in and the creditor accepts an account in which the new partner is made liable for the balance—that

(*b*) See, as to this, *ante* p. *205, *et seq.*

(*c*) See *infra*, p. *254, and Keay *v.* Fenwick, 1 C. P. D 745.

(*d*) As to the effect of taking a new security when no new partner comes in, see *ante* p. *244.

(*e*) 7 Car. & P. 746, and 2 Mees. & W. 484. See, also, Wilson *v.* Lloyd, 16 Eq. 60; Oakeley *v.* Pasheller, 4 Cl. & F. 207, noticed *infra*, p. *251. Compare Commercial Bank Corp. of India and the East, 16 W. R. 958, and Ex parte Gibson, 4 Ch. 662.

discharges the old firm, as both firms cannot be liable at once for the same debt. This is the law as laid down in several cases in which indeed there is some contradiction. However, I believe that what I have stated is the result of them." (*f*)

The jury found for the defendant. A new trial was moved for on the ground that there was no evidence to go to the jury to show that the plaintiff had agreed to discharge the defendant from his liability, but the court (*g*) thought that there was abundant evidence to show that the plaintiff knew of the defendant's retirement, and a new trial was refused.

To this class of cases also belong those already noticed, in which the joint liability of old and new partners has been substituted for that of the old partners only. (*h*)[50]

Release by estoppel.—A creditor may so conduct himself as to be estopped from saying that a retired partner is still liable to him. But it is not often that this can be established. A settlement by partners of their accounts on the footing that one of them only is liable to a creditor, will not affect him unless he has been guilty of some fraud, or has done some act or made some statement in order to induce the partners, or one of them, to settle their accounts on the faith that one of them is no longer liable. (*i*)[51]

Discharge of estate of deceased partner.—Closely allied to the subject which has just been discussed, is that which relates to the

(*f*) The learned judge was scarcely warranted by those cases in going so far as he did.

(*g*) Bolland. B., *dissentiente.*

(*h*) Ex parte Whitmore, 3 Deac. 365; Rolfe *v.* Flower, L. R., 1 P. C. 27, noticed *ante* pp. *208, *209.

50. What will discharge retired partner.—Where one partner retires and the others assume the debts of the old firm, the retiring partner becomes merely a surety in respect to such debts, and where the creditors extend the time of payment in such a case, with knowledge of all the facts, and without the consent of the retiring partner, this will discharge him from liability as respects such debts. Dodd *v.* Dreyfus, 57 How. (N. Y.) Pr. 319; S. C., 17 Hun 600. And see Ætna Ins. Co. *v.* Peck, 28 Vt. 93.

(*i*) See Davison *v.* Donaldson, 9 Q. B. D. 623; Featherstone *v.* Hunt, 1 Barn. & C. 113, a case of alleged fraud.

51. Release by estoppel.—Where the creditors of a commercial partnership make settlement with the liquidating partner after dissolution, and take his separate notes in full settlement of their claim, and it appears that they were at the time aware that the liquidating partner had assumed all the liabilities of the partnership, the retiring partner will not afterwards be held responsible. Hoopes *v.* McCan, 19 La. Ann. 201.

discharge of the estate of a deceased partner from the liabilities to which he was subject as a partner at the time of his death. The position of the estate of a deceased partner, with reference to the question of discharge by reason of a creditor's dealings with the surviving *partners, is very similar to the position of a retired partner. The same principles are applicable to both, and the authorities which are in point as regards the one are so also as regards the other. The parallel between the two would be complete were it not that before the Judicature acts the estate of a partner who died in the lifetime of his copartners was liable for the joint debts of the firm in equity only, (*k*) and there might have been circumstances to induce a court of equity to hold that estate discharged, although the same circumstances would not, in the case of a retiring partner, have operated as a discharge at law, (*l*) and *vice versa*. (*m*)

*250]

It has been decided in equity that if a creditor of a firm knows of the death of one of the firm and continues to deal as before with the survivors, he does not lose the remedy which he had against the estate of the deceased partner unless there is evidence showing an intention to abandon the right of having recourse thereto for payment; (*n*) and an attempt by the creditor to obtain payment from the survivors is not sufficient evidence of such an intention. Thus, if he sues the survivors and obtains judgment against them, this will not necessarily deprive him of his right to obtain payment out of the estate of the deceased. (*o*) So, proving in bankruptcy against the estate of the new firm is not, *per se*, sufficient to preclude the creditor from afterwards having recourse to the assets of the dead partner. (*p*) Still less will any dealing with the surviving partner if induced by his fraud. (*q*) [52]

(*k*) As to the nature of this liability, see *ante* p. *194.

(*l*) See Ex parte Kendall, 17 Ves. 522, 525.

(*m*) Jacomb *v.* Harwood, 2 Ves. Sr. 265.

(*n*) Winter *v.* Innes, 4 Myl. & C. 101, and see Devaynes *v.* Noble, Sleech's case, 1 Mer. 539; Clayton's Case, Id. 579; Palmer's Case, Id. 623; Braithwaite *v.* Britain, 1 Keen 206.

(*o*) Jacomb *v.* Harwood, 2 Ves. Sr. 265; and *ante* p. *195, and *infra*, p. *257.

(*p*) Sleech's Case, 1 Mer. 570; Harris *v.* Farwell, 15 Beav. 31. But compare Brown *v.* Gordon, 16 Beav. 302, and Bilborough *v.* Holmes, 5 Ch. D. 255, *infra* note (*s*).

(*q*) As in Plumer *v.* Gregory, 18 Eq. 621.

52. Discharge of estate of deceased

Liability not discharged by dealing with new persons.—Even where a new partner has been introduced, a creditor of the old firm who continues to deal with the new firm as he dealt with the old, and is paid interest by the new firm *as if the debt was its own, does not thereby deprive himself of his right to be paid out of the estate of a deceased member of the old firm. (*r*) In Harris *v.* Farwell (*s*) a banking firm consisting of three partners became indebted to a customer on a deposit note; one of them died, and the survivors took his son into partnership with them. The new partnership paid interest on the note for some time and then became bankrupt. The plaintiff proved against the new firm for the amount of his debt, and was paid a dividend out of its estate. It was held that he had done nothing which precluded him from having recourse to the estate of the deceased partner. 53

partner.—Where one of two partners dies, and judgment is recovered against the surviving partner for a partnership debt, and he becomes a bankrupt before the judgment is satisfied, the executors of the other may be compelled in chancery to make satisfaction. Storer *v.* Hinkley, Kirby (Conn.) 147.

The effects of a deceased partner cannot be pursued, in law or equity, while the surviving partner is solvent. Alsop *v.* Mather, 8 Conn. 584.

The partners who continue the business cannot bind the estate of the deceased partner by notes given in the firm name for debts due before his death, to creditors notified of the dissolution. Citizens' Mutual Ins. Co. *v.* Ligon, 59 Miss. 305.

When a firm creditor compromises with and releases the surviving partner, this violates the rights of the personal representatives of the deceased partner, and releases them from their liabilities as sureties, although by its terms the release purports to discharge only the personal liability of the surviving partner. Murry *v.* Fox, 39 Hun (N. Y.) 108.

The estate of the deceased partner cannot be charged with any part of the losses which may result from the carrying on of new business, after his death, by the surviving partners. Tompkins *v.* Tompkins, 18 So. Car. 1.

(*r*) Daniel *v.* Cross, 3 Ves. 277.

(*s*) 15 Beav. 31. It does not appear from the report when the customer first knew of the change in the firm. Compare Bilborough *v.* Holmes, 5 Ch. D. 255, a somewhat similar case, where the estate of the deceased partner was held to be discharged. The proof, however, there, was for money lent to the new firm.

53. Liability not discharged by dealing with new firm.—The fact that a creditor of a firm, one partner in which has died, looked to the survivors for payment of his debt and took interest from them thereon, will not relieve the estate of the deceased partner from liability. If the administrator claims that there was an agreement to accept the liability of the surviving partners constituting the new firm, such agreement must be clearly proved. Fogarty *v.* Cullen, 49 N. Y. Super. Ct. 397.

Effect of administering the estate.—On the other hand, if, after the death of a partner, a creditor of the old firm knows of the death and does not take any steps to obtain payment from the estate of the deceased, if the creditor lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone were his debtors, in that case the creditor will not be allowed to resort to the assets of the deceased. Oakeley *v.* Pasheller and Brown *v.* Gordon may be referred to as illustrating this doctrine.

In Oakeley *v.* Pasheller (*t*) two partners, A and B, executed three joint and several bonds to the plaintiff to secure repayment of money lent. A died, and B took in C as a partner with him. An agreement was come to between A's executors and B & C that the latter should take the assets and liabilities of the old firm and indemnify A's estate from those liabilities. Of this the plaintiff had notice. (*u*) He was paid interest on his bond by the new firm and received accounts from it in which the old debt and the debts contracted by the new firm were blended together. On two occasions
*252] the plaintiff *had agreed to give, and had given, the new firm considerable further time to pay the bonds, but A's executors had no notice of this. Ultimately the plaintiff took from B & C an assignment of some policies as a collateral security for payment of the bonds, expressly reserving his rights against A's estate. It was, however, held that A's estate had been discharged from its liability from what had previously taken place. The court thought that A's estate had become, as it were, surety only for payment of the debt, and that it had been discharged by the long indulgence granted by the plaintiff to the other debtors. (*x*) The

A partnership creditor, after the death of one partner, may continue to deal with the survivor, and receive partial payments from him without prejudice to his right to resort to the assets of the deceased partner; and he does not lose this right by delay in calling upon the survivor for payment. Hamersley *v.* Lambert, 2 Johns. (N. Y.) Ch. 508.

(*t*) 10 Bli. (N. S.) 548, and 4 Cl. & F. 207. See, on it, Swire *v.* Redman, 1 Q. B. D. 543. In Wilson *v.* Lloyd, 16 Eq. 60, this case was followed, though no new partner joined the firm, but Wilson *v.* Lloyd cannot be relied upon. See Simpson *v.* Henning, L. R., 10 Q. B. 406.

(*u*) See 4 Cl. & F. 212. The marginal note states that he had not.

(*x*) This *quasi* suretyship is surely a false analogy, unless the creditor has

true *ratio decidendi*, however, was that the plaintiff had accepted B & C as his sole debtors.

In Brown *v.* Gordon (*y*) the plaintiff deposited money with a banking firm consisting of three partners, A, B and C; D afterwards became a partner. A died, having made a will containing a trust for payment of his debts. After A's death, his son, who was also his executor and residuary devisee and legatee, became a partner in the bank. Some time afterwards B and C died. The bank had been continued, first by B, C, D and A's son; then by D, C and A's son, and lastly by D and A's son; but it ultimately stopped payment, and the two surviving partners were adjudged bankrupts. Interest had been paid to the plaintiff by the successive firms, and the plaintiff's debt was proved in the Bankruptcy Court. On a bill filed for the purpose of obtaining payment out of A's estate, it was held that the plaintiff, by neglecting for sixteen years to make any claim against the assets of the deceased, and by treating the successive firms as his debtors, had discharged the estate of the deceased, and that he could not be considered as a creditor of the deceased so as to avail himself of the trust in the will for payment of debts.[54]

Cases of fraud.—In whatever way a creditor may have dealt with the surviving *partners, he cannot be held to have adopted them as his sole debtors in respect of a demand arising out of a fraudulent transaction, of which he has been constantly kept in ignorance. (*z*) [*253

assented to such a change in his debtor's position. See, on this point, Oakford *v.* European, &c., Ship Co., 1 Hem. & M. 182, *ante* p. *244; Swire *v.* Redman, 1 Q. B. D. 537. See, also, Rodgers *v.* Maw, 4 Dowl. & L. 66.

(*y*) 16 Beav. 302; Bilborough *v.* Holmes, 5 Ch. D. 255, a similar case, but not so strong. See *ante* note (*s*).

54. Effect of administering the estate.—The administrator of a deceased partner has no right to interfere with the surviving partner in the settlement of the partnership estate. Camp *v.* Fraser, 4 Den. (N. Y.) 212. But see Weise *v.* Moore, 22 Mo. App. 530.

The act of an executor of a deceased partner in allowing his interest to remain in the firm, will not render the estate liable for debts contracted after his death; but an executor who actually enters into the conducting of the business without authority, in order to benefit the estate, is personally liable. Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305. See, also, Brasfield *v.* French, Id. 632.

(*z*) See Clayton's Case, 1 Mer. 579; *ante* pp. *235, *236.

Recapitulation.—Before leaving this subject, it may be useful shortly to review the effect of the numerous cases which have been noticed in the preceding pages. Those cases establish that:

1. An express agreement by the creditor to discharge a retired partner and to look only to a continuing partner is not inoperative for want of consideration; for Lodge *v.* Dicas (*a*) has, as to this point, been overruled by Thompson *v.* Percival. (*b*)

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (*c*) or in equity. (*d*)

3. And it will certainly not do so if, by expressly reserving his rights against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm. (*e*)

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be. (*f*)

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment. (*g*)

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm and goes on dealing with the latter for many years, making no demand for payment against the *old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the court will not disturb the verdict; (*h*) and if the question arises before a judge,

*254]

(*a*) 3 B. & A. 611.

(*b*) 5 B. & Ad. 925.

(*c*) David *v.* Ellice, 5 Barn. & C. 196; Thompson *v.* Percival, 5 B. & Ad. 925; Heath *v.* Percival, 1 P. Wms. 682, and 1 Str. 403; Kirwan *v.* Kirwan, 2 Cromp. & M. 617; Gough *v.* Davies, 4 Price 200; Blew *v.* Wyatt, 5 Car. & P. 397.

(*d*) Oakford *v.* European, &c., Ship Co., 1 Hem. & M. 182; Sleech's Case, 1 Mer. 539; Clayton's Case, Id. 579; Palmer's Case, Id. 623; Braithwaite *v.* Britain, 1 Keen 206; Winter *v.* Innes, 4 Myl. & C. 101.

(*e*) Bedford *v.* Deakin, 2 B. & A. 210; Jacomb *v.* Harwood, 2 Ves. Sr. 265.

(*f*) Robinson *v.* Wilkinson, 3 Price 538.

(*g*) Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 Id. 122.

(*h*) Hart *v.* Alexander, 2 Mees. & W. 484.

e. g., in bankruptcy or in the administration of the estate of a deceased partner, the court will consider all the circumstances of the case, and will infer a discharge if, upon the whole, justice to all parties so requires. (*i*) But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the court is strongly in favor of the creditor.

(b) *Of the effect of merger and judgment recovered.*

Merger of one security in another.—Having now examined the mode in which a partner may be discharged from liability, by reason of a substitution of some other person in his place with the creditor's assent, it is necessary to advert to a doctrine by which a partner occasionally finds himself discharged, simply because his creditor has obtained a security of a higher nature than that which he previously possessed.

Bills, &c., create no merger.—If a person solely indebted enters into partnership with another, and the two give a joint note or bill for the debt of the first, and the note or bill is not paid, the creditor is not precluded from demanding payment from his original debtor, (*k*) unless it can be shown that the bill or note was taken in satisfaction of the original demand. (*l*) So, if two partners are indebted on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonored, the creditor who took it will not be precluded from having recourse to both partners for payment, (*m*) unless it can be *shown that he intended to substitute the liability of the one for the joint liability of the two. (*n*) [*255

(*i*) Ex parte Kendall, 17 Ves. 522, 525; Oakeley *v.* Pasheller, 4 Cl. & F. 207; Wilson *v.* Lloyd, 16 Eq. 60; Brown *v.* Gordon, 16 Beav. 302.

(*k*) Ex parte Seddon, 2 Cox 49; Ex parte Lobb, 7 Ves. 592; Ex parte Meinertzhagen, 3 Deac. 101; Ex parte Hay, 15 Ves. 4; Ex parte Kedie, 2 Deac. & C. 321.

(*l*) As in Ex parte Whitmore, 3 Deac. 365; Ex parte Kirby, Buck 511; Ex parte Jackson, 2 Mont., D. & D. 146.

(*m*) Keay *v.* Fenwick, 1 C. P. D. 745; Bottomley *v.* Nuttall, 5 C. B. (N. S.) 122; Whitwell *v.* Perrin, 4 C. B. (N. S.) 412; Ex parte Hodgkinson, 19 Ves. 291. See, too, Ex parte Raleigh, 3 Mont. & A. 670; Bedford *v.* Deakin, 2 B. & A. 210, noticed *ante* p. *244.

(*n*) As the jury found was the case in

Securities of a higher nature do.—But when a creditor obtains from his debtor a security of a higher nature than he had before, and does not take care to accept it as a collateral security,(*o*) the original debt is merged in the higher security, and can no longer be made the foundation of an action, or of proof in bankruptcy,(*p*) and this doctrine is as much applicable to joint as to several obligations. And there is no mean authority for saying that if two parties are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end;(*q*) but there are recent decisions to the contrary,(*r*) and the question cannot be considered as yet settled.[55]

Evans *v.* Drummond, 4 Esp. 89, and Reed *v.* White, 5 Id. 122. Compare the cases in the last note.

(*o*) As in Ex parte Hughes, 4 Ch. D. 34, note.

(*p*) Ex parte Oriental Financial Corporation, 4 Ch. D. 33; Higgen's Case, 6 Co. 44 *b;* Owen *v.* Homan, 3 Macn. & G. 378; Price *v.* Moulton, 10 C. B. 561; Shack *v.* Anthony, 1 Man. & S. 573. A judgment on a covenant in a mortgage does not affect the right of the mortgagee to foreclose. Popple *v.* Sylvester, 22 Ch. D. 98; Ex parte Fewings, 25 Ch. D. 338.

(*q*) Basset *v.* Wood, 11 Vin. Ab., "Exting." B, 8; and see Owen *v.* Homan, 3 Macn. & G. 407; Ex parte Hernaman, 12 Jur. 642, and 17 L. J. Bk. 17.

(*r*) Sharpe *v.* Gibbs, 16 C. B. (N. S.) 527; Ansell *v.* Baker, 15 Q. B. 20; and *infra*, note (*c*).

55. Merger of debt in security of higher grade.—The acceptance of a security of a higher dignity merges and extinguishes the original cause of action; yet if one partner, who has executed in the name of the firm a single bill for the amount of a debt which the firm owes, afterwards gives a promissory note in the name of the firm, a recovery may be had thereon against the firm. The partnership debt, which was extinguished by the acceptance of the single bill, is thereby revived. Davidson *v.* Kelly, 1 Md. 492.

The execution of a sealed note for a debt due by partners, by one of them, in the firm name, without authority, does not merge the joint liability on the simple contract. Brozee *v.* Poyntz, 3 B. Mon. (Ky.) 178; Calk *v.* Orear, 2 Id. 420; Horton *v.* Child, 4 Dev. (N. C.) L. 460.

A creditor who sues the individual members of a dissolved firm, for goods sold to the firm, founding his action both on an itemized account of the goods sold, and also on a firm note given in payment therefor by one partner without authority to sign for the firm, may recover on the original claim for goods sold and delivered. Dodd *v.* Bishop, 30 La. Ann. 1178.

The joint and several note of a partnership is not extinguished by a transfer thereof to another firm composed in part of the same persons; and the latter firm may negotiate the note to third persons. Fulton *v.* Williams, 11 Cush. (Mass.) 108.

A partnership assigned the partnership effects for the benefit of such cred-

Judgment recovered.—If a joint creditor obtains judgment against one of the partners only, he loses his remedy against the others, even if not known to him. (*s*) But this rule does not apply when the other partners are abroad, and cannot therefore be sued here with effect. (*t*) If one partner only is sued, and judgment is given for him, the creditor is not precluded from afterwards suing the others, unless the first action failed for a reason which applies equally to the second. (*u*)

It has been already seen that a judgment recovered against continuing partners and an incoming partner is a defence to an
256*] *action against a retired partner who might have been sued with the continuing partners in the first instance. (*x*)[56]

itors as should sign the deed of assignment, and receive their dividends; and, in consideration thereof, and that they would release the other partners, the senior partner covenanted to pay the balance due such creditors after exhausting the property assigned. *Held*, that the prior claims of the creditors who became parties to the agreement were extinguished, and merged in the covenant of the senior partner. Hosack *v.* Rogers, 8 Paige (N. Y.) 229.

A promissory note given by a firm is not merged in a bond and mortgage, executed at the same time and for the same debt, by one partner in the name of the firm, but without the knowledge of his copartners. Pierce *v.* Cameron, 7 Rich. (S. C.) 114.

The mere acceptance of a bond and a deed of trust to secure it, by a creditor, from one member of the firm after dissolution, for a partnership debt due by simple contract, destroys the right of the creditor to proceed at law against the other member; but a court of equity will look at the attendant circumstances of the case, and will not absolve the firm from liability unless it appears from those circumstances, or otherwise, that the higher security was accepted as a substitute for the simple contract of the firm. Niday *v.* Harvey, 9 Gratt. (Va.) 454.

(*s*) Kendall *v.* Hamilton, 4 App. Cas. 504; King *v.* Hoare, 13 Mees. & W. 494; Ex parte Higgins, 3 De G. & J. 33. See, as to dormant partners, Cambefort *v.* Chapman, 19 Q. B. D. 229, noticed in the addenda. In Baddeley *v.* Consolidated Bank, 34 Ch. D. 536, the surety had not recovered judgment, and this rule did not apply. A colonial judgment creates no merger. Bank of Australasia *v.* Nias, 16 Q. B. 717.

(*t*) See 19 and 20 Vict., c. 97, § 11; Ex parte Waterfall, 4 De G. & S. 199.

(*u*) Phillips *v.* Ward, 2 Hurlst. & C. 717.

(*x*) Scarfe *v.* Jardine, 7 App. Cas. 345, *ante* pp. *46 and *197. See, also, Cambefort *v.* Chapman, 19 Q. B. D. 229, noticed in the addenda.

56. Judgment recovered, when a merger.—When a judgment is obtained against one of two partners on a joint contract, the contract is merged in the judgment; and an action at law cannot be maintained thereon against the partners. Sedan *v.* Williams, 4 McLean

Merger of joint and several obligations.—With respect to obligations which are joint as well as several, there is more difficulty A joint and several obligation, arising *ex delicto*, is extinguished by

(U. S.) 51; Smith *v.* Black, 9 Serg. & R. (Pa.) 142. *Contra*, Williams *v.* Rogers, 14 Bush (Ky.) 777.

The ostensible partner of a firm gave notes in the partnership name, which was his own name, for goods purchased for the use of the partnership, upon which the payee, in ignorance of the partnership, sued and recovered judgment against the ostensible partner alone. *Held*, in an action afterwards brought against the dormant partner, that his liability upon the notes was extinguished by the judgment. Moale *v.* Hollins, 11 Gill & J. (Md.) 11.

A bill against dormant partners, after judgment recovered against the ostensible partners, cannot be sustained, without showing special cause for relief; as that the plaintiff was kept in ignorance of the partnership by undue means; that he has used due diligence to inform himself, &c. Penny *v.* Martin, 4 Johns. (N. Y.) Ch. 566.

When not a merger.—Where a state statute provides that in suits against two or more jointly indebted, the judgment shall be evidence, as against those not served with process, only of the extent of the plaintiff's demand, the original demand against the parties not brought into court is not merged in the judgment against those who were (overruling 6 Cranch (U. S.) 253). Mason *v.* Eldred, 6 Wall. (U. S.) 231.

Judgment against one partner upon a contract, upon its face his sole and individual contract, is no bar to a subsequent action upon it as a partnership contract. Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416.

Where one of several partners unites with a third person in making a note to a creditor of the firm, for a partnership debt, which, by agreement, is made and accepted, not for the debt, but as collateral security merely, a judgment upon the note will not merge or affect the original indebtedness, even as to the partner signing the note. In such a case, the agreement prevents the merger. Hawks *v.* Hinchcliff, 17 Barb. (N. Y.) 492.

A judgment recovered in Missouri, where by the law all contracts are construed as joint and several, against one of three copartners who had drawn bills upon the plaintiffs, which were accepted in this state, and paid for accommodation, without funds, is not a merger of the right of action against the other partners in this state. Reed *v.* Girty, 6 Bosw. (N. Y.) 567.

Relief in equity against merger by judgment.—The fact that a judgment was rendered against part of the members of a firm does not affect the equitable right to have the partnership property subjected to its payment. Equity does not regard the form of the judgment, but the substance of the debt. Martin *v.* Davis, 21 Iowa 535.

Where a partnership exists between two persons, one of whom is a dormant partner, and the creditors of the firm have obtained judgments against the ostensible partner, founded on debts created on the partnership account, upon which executions have been issued and returned *nulla bona*, a bill in equity against both partners will be sustained, upon the allegation that the dormant partner has, by fraudulent connivance with the ostensible one, obtained the possession of and laid claim to all the partnership

a judgment recovered against any one of the persons obliged;(*y*) but as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged extinguishes the separate liability of each, for *nemo debet bis vexari pro eadem causa*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others.(*z*) In order that this effect may be produced, the judgment must be satisfied.(*a*) As regards joint and several liabilities arising from breaches of trust, a joint judgment does not preclude proof in bankruptcy against the separate estates of the judgment debtors.(*b*)

Further, if several persons are jointly liable, and one of them afterwards gives a separate collateral security on which judgment is recovered against him, this will not merge the prior joint liability.(*c*)

Effect of doctrines of merger on securities for future advances.—The rule that a bond or judgment merges any simple contract debt in respect of which it may have been given or obtained, only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple contract creditor. So that if a bond is given or a judgment is obtained, under a warrant of attorney, as a security for *future* advances,(*d*) or if a simple contract debtor gives a bond or *confesses a judgment to a trustee for his creditor,(*e*) in neither of these cases will there be any merger. [*257

Estates of deceased partners.—It must also be borne in mind that as regards the liability of the estate of a deceased partner, at

assets, in fraud of the creditors; the relief which equity will give is to subject the whole assets to the payment of such debts. How *v.* Kane, 2 Chand. (Wis.) 222.

(*y*) Brinsmead *v.* Harrison, L. R., 6 C. P. 584, affirmed 7 Id. 547; Brown *v.* Wootton, Cro. Jac. 73; Buckland *v.* Johnson, 15 C. B. 145; and see, as to the plea of another suit depending, Boyce *v.* Douglas, 1 Camp. 61.

(*z*) Ex parte Christie, Mont. & B. 352. See, also, Ansell *v.* Baker, 15 Q. B. 20.

(*a*) Higgen's Case, 6 Co. 46, *a*; King *v.* Hoare, 13 Mees. & W. 494; and see Drake *v.* Mitchell, 3 East 251.

(*b*) Re Davison, 13 Q. B. D. 50.

(*c*) Drake *v.* Mitchell, 3 East 251. See, too, Re Clarkes, 2 Jones & L. 212; Ex parte Bate, 3 Deac. 358. Compare Cambefort *v.* Chapman, 19 Q. B. D. 229, noticed in the addenda.

(*d*) Holmes *v.* Bell, 3 Man. & G. 213, and the note there.

(*e*) Bell *v.* Banks, 3 Man. & G. 258. In such a case equity would probably follow the law, *ut res magis valeat quam pereat.*

law when a partner died, his liability on contracts survived to his copartner, who alone could be sued in respect of them. Hence, a judgment recovered against the surviving members of a firm does not preclude the judgment creditor from obtaining payment of his original debt from the estate of the deceased partner in equity; (*f*) nor does proof against his estate afford a defence to an action against the surviving partners. (*g*)

Merger not an extinction of the debt.—Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor. (*h*)

Proof in bankruptcy.—Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt does not preclude the proving creditor from afterwards suing the solvent partners and recovering from them what he may have failed to obtain in the bankruptcy. (*i*)

4. *Lapse of time.*

Statutes of limitation.—By a number of well-known enactments, usually referred to as the statutes of limitation, a certain definite time has been prescribed within which, if at all, a person having a demand against another must enforce it. These statutes apply as well to partners as to other persons, and it becomes, therefore, necessary to advert to them in the present work.

The principal statutes are the following: (*k*) 21 Jac. I., *c. 16; 4
*258] and 5 Anne, c. 16; 3 and 4 Wm. IV., c. 27; 3 and 4 Wm. IV., c. 42; 19 and 20 Vict., c. 97; 37 and 38 Vict., c. 57.

Times limited for bringing actions.—Neglecting those provisions of the statutes of limitations which are of little importance to partners, the times prescribed for the prosecution of actions are as follows:

(*f*) Jacomb *v.* Harwood, 2 Ves. Sr. 265; Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24. See, also, Rawlins *v.* Wickham, 3 De G. & J. 304, *ante* pp. *195, *250.

(*g*) Re Hodgson, 31 Ch. D. 177.

(*h*) Re Davison, 13 Q. B. D. 50; Re Griffiths, 3 De G., M. & G. 174, and the cases there cited.

(*i*) Keay *v.* Fenwick, 1 C. P. D. 745; Whitwell *v.* Perrin, 4 C. B. (N. S.) 412; Bottomley *v.* Nuttall, 5 C. B. (N. S.) 122.

(*k*) The principal act relating to Ireland is 16 and 17 Vict., c. 113. See section 20.

Twelve years for the recovery of legacies, of rent, of money charged on lands, of money due on judgments, bonds and mortgages, and for the redemption of mortgages. 3 and 4 Wm. IV., c. 27, §§ 28, 40; 3 and 4 Wm. IV., c. 42; 37 and 38 Vict., c. 57.

Six years for the recovery of arrears of rent, and of interest on money charged on land (3 and 4 Wm. IV., c. 27, §§ 41, 42); and for the recovery of seamen's wages (4 and 5 Anne, c. 16, § 17); and of money due on bills of exchange, promissory notes, or in respect of any other contract which is not under seal (21 Jac. I., c. 16, § 3); and of money due on awards where the submission is not under seal (3 and 4 Wm. IV., c. 42, § 3); and for the institution of actions or suits for an account. 21 Jac. I., c. 16, § 3, and 19 and 20 Vict., c. 97, § 9.

Four years for the recovery of damages in respect of an assault, battery, or false imprisonment. 21 Jac. I., c. 16, § 3.

Two years for the recovery of damages for words of themselves defamatory (21 Jac. I., c. 16, § 3); and for the recovery of penalties, damages, or sums given by statute to the party grieved. 3 and 4 Wm. IV., c. 42.

Further time.—There are provisions extending these periods in favor of persons who, when their right to sue accrues, are within the age of twenty-one, under the disability of coverture, or of unsound mind; (*l*) and also in favor of those whose demands are against persons beyond the seas. (*m*) But the absence beyond the seas, of one of several joint debtors does not now, as it did formerly, enlarge the time for suing the others. (*n*)

**Account between merchants.*—By the statute of James, actions "for such accounts as concern the trade of merchan- [*259

(*l*) 21 Jac. I., c. 16, § 7; 3 and 4 Wm. IV., c. 42, § 4; 3 and 4 Wm. IV., c. 27, § 16, &c.; 37 and 38 Vict., c. 57, § 3. The imprisonment, or absence beyond the seas, of a creditor does not now enlarge his time for suing. 19 and 20 Vict., c. 97, § 10; Cornill *v.* Hudson, 8 El. & B. 429; Pardo *v.* Bingham, 4 Ch. 735. The absence beyond the seas, of one of several joint creditors did not enlarge their time for suing under the old law. Perry *v.* Jackson, 4 T. R. 516.

(*m*) 4 and 5 Anne, c. 16, § 19, and 3 and 4 Wm. IV., c. 42, § 4.

(*n*) 19 and 20 Vict., c. 97, § 11. See, as to what is "beyond the seas," section 12, and as to the old law, Fannin *v.* Anderson, 7 Q. B. 811; Towns *v.* Mead, 16 C. B 123.

dise between merchant and merchant, their factors or servants," were excepted from limitation, but this exception no longer exists, (*o*) and actions for an account, or for not accounting, must be brought within six years. (*p*)

General rules applicable to the statutes of limitation.—In applying the statutes of limitation to any particular case, it is important to bear in mind one or two principles applicable to them all.

1. *Foreign debts.*—Although a debt may have been contracted abroad, any person who attempts to enforce it in this country must do so within the time limited by the English statutes; for it is by them, and not by the law of the place where the debt was contracted, that English courts are governed in a matter of this description. (*q*)

2. *Continuous running of time.*—When once time has begun to run, no subsequent disability or inability to sue stops it, (*r*) except where a defendant dies and there is no representative to sue. (*s*)

3. *When time begins to run.*—Time begins to run from the moment the right to sue arises; (*t*) but in a case of concealed fraud, from the moment *when the person acquiring the right first becomes aware of it. (*u*)

*260]

(*o*) 19 and 20 Vict., c. 97, § 9.

(*p*) See 19 and 20 Vict., c. 97, § 9, and 21 Jac. I., c. 16, § 3. This branch of the subject will be examined more at length in that part of the work which treats of accounts between partners. The principal cases on the exception relating to merchants' accounts are, Inglis *v.* Haigh, 8 Mees. & W. 769; Cottam *v.* Partridge, 4 Man. & G. 271; Robinson *v.* Alexander, 8 Bli. (N. S.) 352; Forbes *v.* Skelton, 8 Sim. 335. See Webber *v.* Tyvill, 2 Wms. Saund. 124, and the note there.

(*q*) See The British Linen Co. *v.* Drummond, 10 Barn. & C. 903; Huber *v.* Steiner, 2 Bing. N. C. 202.

(*r*) See Rhodes *v.* Smethurst, 4 Mees. & W. 42, and 6 Id. 351; Goodall *v.* Skerratt, 3 Drew. 216; Wych *v.* East India Co., 3 P. Wms. 309. There is, however, an exception to this rule, where an action brought in time becomes abated, and another is afterwards commenced. See Sturgis *v.* Darrell, 4 Hurlst. & N. 622, and 6 Id. 120. See, as to how far merely landing at an English port is a return, so as to make time begin to run, Gregory *v.* Hurrill, 5 Barn. & C. 341, and 1 Bing. 324.

(*s*) Swindell *v.* Bulkeley, 18 Q. B. D. 250.

(*t*) This was so at law, even in cases of concealed fraud. The Imperial Gas Co. *v.* The London Gas Co., 10 Exch. 39; Hunter *v.* Gibbons, 1 Hurlst. & N. 459. See Bree *v.* Holbech, Doug. 655. But see, now, Jud. act 1873, § 24; Jud. act 1875, § 10, cl. 11, and the cases in the next note.

(*u*) Gibbs *v.* Gould, 9 Q. B. D. 59; South Sea Co. *v.* Wymondsell, 3 P. Wms.

4. *Cases of trust.*—The claim of a *cestui que trust* against his trustee in respect of a breach of an express trust is not barred by mere lapse of time, (*x*) although it is otherwise if the trust is only constructive. (*y*) In consequence of the first branch of this rule, if a partner dies, having made a will containing a trust for payment of his debts, his estate will be liable to the demands of creditors of the firm much longer than if there were no such trust in the will. (*z*)

5. *Revival of debts.*—After time has begun to run, and even after it has run, a debt may be revived by a written promise to pay it, or by an acknowledgment in writing, from which a promise to pay it may be inferred, (*a*) or by a payment on account of the principal or interest due, (*b*) from which a similar promise may be implied. (*c*)

Application of these rules to partners.—In order that the application of these general rules to partners may be fully understood, it becomes necessary to consider the extent to which one partner can affect the other by acknowledging and promising to pay, or by making payments on account of a partnership debt. The old law upon this subject was materially altered by the Mercantile Law Amendment act, *but in order to understand its provisions a short allusion to the law as it previously stood is necessary. [*261 Prior to the act in question, it was held that—

143; Blair *v.* Bromley, 2 Ph. 354, and 5 Hare 542; Petre *v.* Petre, 1 Drew. 397. The fraud in Urquhart *v.* Macpherson, 3 App. Cas. 838, was not alleged to have been concealed.

(*x*) See Jud. act, 1875, § 10, cl. 2.

(*y*) Banner *v.* Berridge, 18 Ch. D. 254; Beckford *v.* Wade, 17 Ves. 87.

(*z*) See Ault *v.* Goodrich, 4 Russ. 430; Braithwaite *v.* Britain, 1 Keen 206; Brown *v.* Gordon, 16 Beav. 302. See, also, Pare *v.* Clegg, 29 Beav. 589, where a society's property was, on its dissolution, subjected to a trust for the payment of its creditors.

(*a*) See Tanner *v.* Smart, 6 Barn. & C. 603. The cases upon the question, What is a sufficient acknowledgment? are innumerable. The following are selected for reference: Green *v.* Humphreys, 26 Ch. D. 474; Mitchell's Claim, 6 Ch. 822, a letter without prejudice; Bourdin *v.* Greenwood, 13 Eq. 281, a mem. on a prom. note; Bush *v.* Martin, 2 Hurlst. & C. 311, entry by a committee in their minutes; letter asking for an account, or admitting a liability to account. Banner *v.* Berridge, 18 Ch. D. 254; Quincey *v* Sharpe, 1 Ex. D. 72; Prance *v.* Sympson, Kay 678. A letter from one partner to another will not avail a creditor whose debt is mentioned and recognized in it. Re Hindmarsh, 1 Drew. & S. 129.

(*b*) See Whitcomb *v.* Whiting, 1 Sm. Lead. Cas., and the note there.

(*c*) See Morgan *v.* Rowlands, L. R., 7 Q. B. 493.

1. *Admissions by one partner.*—An admission by one of several joint debtors that their debt was still due, was not sufficient to take the case out of the statutes as against the others, nor even as against the person making the admission, unless it were in writing, signed by him. (*d*) [57]

2. *Promise by one partner.*—An actual promise by one of several joint debtors that the debt should be paid, was of no validity against any person except him who made it, and not even against him unless it were in writing and signed by him. (*e*) [58]

3. *Payment by one partner.*—But as regards payment, (*f*) it was held that if one of several joint debtors paid any money on account of the principal or interest due from them all, such payment was sufficient to take the debt out of the statute, not only as against the person making the payment, but as against all the others jointly

(*d*) 9 Geo. IV., c. 14, § 1; Hyde *v.* Johnson, 2 Bing. N. C. 777; Bristow *v.* Maxwell, 11 Ir. Law Rep. 461. It was otherwise before 9 Geo. IV., c. 14. See Manderston *v.* Robertson, 4 Man. & R. 440. As to admissions by one partner, see *ante* p. *128.

57. **Revival of debt by admissions or acknowledgment.**—The surviving partner's acknowledgment of the claim will not bind the estate of the deceased partner if the claim is barred by statute as against the estate. Espy *v.* Comer, 76 Ala. 501.

After the dissolution of a partnership, an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm which is barred by the statute of limitations. Van Keuren *v.* Parmalee, 2 N. Y. 523; Walsh *v.* Cane, 4 La. Ann. 533; Kauffman *v.* Fisher, 3 Grant (Pa.) Cas. 302; Reppert *v.* Colvin, 48 Pa. St. 248. *Contra*, see Smith *v.* Ludlow, 6 Johns. (N. Y.) 267; Ward *v.* Howell, 5 Harr. & J. (Md.) 60; Neal *v.* Hassan, 3 McCord (S. C.) 278; Greenleaf *v.* Quincy, 11 Me. 11. See, also, Carroll *v.* Gayarré, 15 La. Ann. 671.

An act or acknowledgment of one partner will not take a firm debt out of the statute after dissolution, so as to bind the other partner, unless the one doing the act or making the acknowledgment has become the liquidating partner. William *v.* Waugh, 101 Pa. St. 233.

(*e*) See the last note.

58. **Promise of one partner.**—Where one of several partners, after the dissolution of the partnership, assumed a partnership debt, but afterwards pleaded the statute of limitations, jointly with the other partners, to an action upon such debt—*Held*, that the promise of such partner might be given in evidence, for the plea admitted that they did once assume. Brockenbrough *v.* Hackley, 6 Call (Va.) 51.

(*f*) As to payment by bills, see Gowan *v.* Forster, 3 B. & Ad. 507; Irving *v.* Veitch, 3 Mees. & W. 90; Turney *v.* Dodwell, 3 El. & B. 136.

*262] liable with him. (*g*) But even before the Mercantile *Law Amendment act, payment by a surviving partner did not prejudice the estate of a deceased partner (*h*) any more than a payment by the executors of the deceased prejudiced the partners who survived; (*i*) for the executors of a deceased partner are not liable jointly with the surviving partners. But if one of the surviving partners was an executor of the deceased, then a question of a different nature arose, turning not only on the effect of the payment as such, but on whether it was made by the survivors as surviving partners only, or as to one of them in his character of executor also. (*k*) [59]

(*g*) See Whitcomb *v.* Whiting, 2 Doug. 652, and 1 Sm. Lead. Cas.; 9 Geo. IV., c. 14, § 1. The doctrine that payment by one partner took a debt out of the statute as against all, was generally rested on the ground that the partner making the payment acted virtually as the agent for the rest. But the right of one of several codebtors (whether they are partners or not) to make a payment on account of the joint debt, is not derived from any authority conferred by the other debtors, for they have no right to prevent their codebtor from relieving himself from a liability to which he is subject as much as they. Moreover, admitting that the doctrines of agency are applicable to payments made by one of several codebtors, it is impossible to justify, on that ground, the decisions which have just been noticed. They were all, it is said, based upon this: that a part payment is evidence of a *new* promise to pay more (Bateman *v.* Pinder, 3 Q. B. 574). But upon what principle can it be held that after a partnership is dissolved one partner has any implied authority from his late partners, to bind them by a fresh promise to pay an old debt? Assuming the debt to be already barred, the question can admit of no satisfactory answer, and yet the decisions went the length of binding the firm even in this extreme case. See the excellent judgment in Bell *v.* Morrison, 1 Pet. (U. S.) 351, set out in Story on Part., § 324, note.

(*h*) Atkins *v.* Tredgold, 2 Barn. & C. 23.

(*i*) Slater *v.* Lawson, 1 B. & Ad. 396.

(*k*) See Braithwaite *v.* Britain, 1 Keen 206, where the payment prevailed; Way *v.* Bassett, 5 Hare 55; Brown *v.* Gordon, 16 Beav. 302, where it did not. See, further, Griffin *v.* Ashby, 2 Car. & K. 139; Atkins *v.* Tredgold, 2 Barn. & C. 23.

59. **Part payment by one partner.**— A payment made upon a simple contract debt of a partnership, after its dissolution, by a partner authorized to settle the concerns of the partnership, and before the debt is already barred by the statute of limitations, is such an acknowledgment of the debt as will take it out of the statute as to all the copartners. Houser *v.* Irvine, 3 Watts & S. (Pa.) 345.

After a firm has been dissolved, partial payment on a firm debt, made by one partner to a party who has had dealings with the firm, and has had no notice of the dissolution, is evidence against all the partners, to prevent the

Liability in equity of estate of deceased partner.—The effect of the statutes of limitation upon suits in equity against the executors of a deceased partner was not well settled. In Winter *v.* Innes (*l*) Lord Cottenham expressed a doubt whether the executors could set up the statute where the surviving partner continued liable and had a right of contribution against them, but in Way *v.* Bassett (*m*) the statute was successfully relied upon as a defence by the executors of a deceased partner, although the surviving partners had by various payments kept the debt alive as against themselves. The law now is in accordance with the latter decision. (*n*)

Alterations introduced by 19 *and* 20 *Vict., c.* 97.—By the Mercantile Law Amendment act, 19 and 20 Vict., c. 97, it is enacted as follows:

Section 13. In reference to the provisions of the acts of 9 Geo. IV., c. 14, §§ 1 and 8, and 16 and 17 Vict., c. 113, §§ 24 and 27 (Irish), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Payments by one of several codebtors.—Section 14. In reference to the provisions of the acts 21 Jac. 1., c. 16, § 3; 3 and 4 Wm. IV., c. 42, § 3, and 16 and 17 Vict., c. 113, § 20 (Irish), when there shall be two or more co-contractors or codebtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any co-contractor, no such co-contractor or codebtor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as

running of the statute of limitations. Kenniston *v.* Avery, 16 N. H. 117.

A statute of Rhode Island provides that "whenever any copartnership shall be dissolved, it shall and may be lawful for any individual who was embraced in such copartnership to make a separate composition or compromise with any one or all of the creditors of such copartnership; and such composition or compromise shall be a full and effectual discharge to the debtor making the same of the whole of said debt, and be taken and considered, in reference to the other copartners, as actual payment of such debtor's proportion of the debts, whether the full amount of his proportion of said debt be actually paid or not." The statute also saves the creditor's action against the other copartners for the balance due. *Held*, that a payment and compromise made by any one copartner is wholly on his own individual account, and is not such an acknowledgment of indebtedness as will bind the other copartners in reference to the statute of limitations. Turner *v.* Ross, 1 R. I. 88.

(*l*) 4 Myl. & C. 101.

(*m*) 5 Hare 55.

(*n*) 19 and 20 Vict., c. 97, § 14, *infra.*

to be charge*able in respect or by reason only (*o*) of payment of any principal, interest or other money, by any other or others of such co-contractors, or codebtors, executors or administrators. [*263

Effect of above statute on partners.—The above statute, it will be observed, has materially altered the law as regards the effect of acknowledgments and part payments. An acknowledgment by an agent being now sufficient to affect his principal, acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm; and notwithstanding section 14, a part payment by a partner will probably be regarded as a part payment by the firm. (*p*)

But after a dissolution a part payment by a continuing or a surviving partner will not prevent a retired partner (*q*) or the executors of a deceased partner (*r*) from availing themselves of the statute; and the same is true of an acknowledgment. (*s*)

(*o*) See, as to this word, Cockrill *v.* Sparkes, 1 Hurlst. & C. 699.

(*p*) See Goodwin *v.* Parton, 42 L. T. 568; Watson *v.* Woodman, 20 Eq. 730.

(*q*) Id. 721.

(*r*) Thompson *v.* Waithman, 3 Drew. 628, in which the surviving partner was the sole executor of the deceased. In this case, section 14 of the act in question was treated as having a retrospective operation, and as destroying the effect of a payment made before the act passed. This, however, was a mistake. In every other respect the case is good law. As to the non-retrospective operation of section 14 of the statute, see Jackson *v.* Woolley, 8 El. & B. 778; Flood *v.* Patterson, 29 Beav. 295.

(*s*) If in any case it could be shown that a continuing or surviving partner was in point of fact authorized to act for the late partner or his executors in making acknowledgments or payments, the case would be different.

*264] # *CHAPTER III.

OF ACTIONS BETWEEN PARTNERS AND NON-PARTNERS.

SECTION I.—ACTIONS BY AND AGAINST PARTNERS, *264.
1. *General observations*, *264.
2. *Actions where no change in the firm has occurred*, *273.
3. *Actions where a change in the firm has occurred*, *284.
SECTION II.—OF SET-OFF, *290.
SECTION III.—OF EXECUTION AGAINST PARTNERS FOR THE DEBTS OF THE FIRM, *298.

General observations.—In order to complete the subjects discussed in the preceding chapters it is necessary to examine the remedies by which rights and obligations between partners and non-partners can be enforced.

It is unnecessary to dwell upon criminal prosecutions, for although partners may be prosecutors or prosecuted in respect of criminal offences, the fact that they are partners has little, if any, effect on their position in a criminal point of view.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are: actions, defences by way of set-off, proceedings to enforce judgments, and proceedings in bankruptcy. The subject of bankruptcy will be discussed hereafter, and the present chapter will therefore be confined to actions, set-off and execution.

SECTION I.—ACTIONS BY AND AGAINST PARTNERS.

1. *General observations.*

The Judicature acts, 1873 and 1875, and the rules of the Supreme

Court, 1883, have materially altered and improved legal proceedings by and against partnerships and unincorporated companies.

1. There is now no distinction between legal and equitable rules as regards parties to sue and be sued. (*a*)

2. No action can be defeated by reason of the misjoinder or non-joinder of parties; (*b*) and pleas in abatement are abolished. (*c*) If too many or too few persons join as plain*tiffs, and the defendant can show that he is thereby prejudiced, he can [*265 apply to have the improper plaintiffs struck out, or the proper plaintiffs joined, as the case may be. (*d*)

3. All persons may be joined as plaintiffs, or as defendants, in or against whom the right to any relief claimed is alleged to exist, whether jointly or severally, or in the alternative. (*e*)

4. A plaintiff may, at his option, join, as parties to the same action, all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes. (*f*)

5. Claims by plaintiffs jointly may be joined with claims by them, or any of them separately, against the same defendant, (*g*) provided no inconvenience is thereby occasioned. (*h*)

6. Parties required by a defendant to be joined for his indemnity or relief by way of contribution may be brought before the court. (*i*)

7. Where there are numerous parties having the same interest in one action, one or more of them may sue or be sued on behalf of all. (*k*)

8. Any two or more persons claiming or being liable as copartners may sue or be sued in the names of the firms of which they were members when the cause of action accrued; (*l*) and provision is made for the discovery of the individuals so suing or being sued. (*m*)

(*a*) See Supreme Court Rules, 1883, Order XVI.
(*b*) Ord. XVI., r. 11.
(*c*) Ord. XXI., r. 20.
(*d*) Ord. XVI., r. 11.
(*e*) Ord. XVI., rr. 1 and 4.
(*f*) Ord. XVI., r. 6.
(*g*) Ord. XVIII., r. 6.
(*h*) Id., r. 7.
(*i*) Ord. XVI., r. 48, *et seq.* See Birmingham Land Co. *v.* L. & N. W. Rail. Co., 34 Ch. D. 261.
(*k*) Ord. XVI., r. 9.
(*l*) Id., rr. 14 and 15.
(*m*) Ord. XVI., rr. 14 and 15, and Ord. VII., r. 2. See, as to the old law, Woolf *v.* City Steam Boat Co., 7 C. B., 103.

Actions in the mercantile name.—With reference to this last rule, it is to be observed that the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constituted the firm when the cause of action accrued. The rule does not incorporate the firm;(*n*) so that if A is a creditor of a firm, B, C & D, and D retires and E takes his place, and the name of the firm continues unchanged, A cannot maintain an *266] *action against B, C and E, in the name of the firm, unless B, C and E have become or are content to be treated as his debtors. In the case supposed, an action against the firm would mean an action against B, C and D, *i. e.*, A's real debtors.[1]

(*n*) See per James, L. J., in Ex parte Blain, 12 Ch. D. 533. As to the Scotch law from which the rule was taken, see Bullock *v.* Caird, L. R., 10 Q. B. 276.

1. When firm may sue in the mercantile name.—The more prevalent and best settled rule is that partners cannot sue or be sued in their copartnership name; but the individual names of those who compose the firm must be set forth. Barber *v.* Smith, 41 Mich. 138; Bentley *v.* Smith, 3 Cai. (N. Y.) 170; Blackwell *v.* Reid, 41 Miss. 102; Burns *v.* Hall, 2 Penn. (N. J.) 984; Crandall *v.* Denny, 1 Penn. (N. J.) 137; Davis *v.* Hubbard, 4 Blackf. (Ind.) 50; Faulkner *v.* Whitaker, 3 Gr. (N. J.) 438; Holland *v.* Butler, 5 Blackf. (Ind.) 255; Hughes *v.* Walker, 4 Id. 50; Livingston *v.* Harvey, 10 Ind. 218; Marshall *v.* Hull, 8 Yerg. (Tenn.) 101; Pate *v.* Bacon, 6 Munf. (Va.) 219; Porter *v.* Cresson, 10 Serg. & R. (Pa.) 257; Seeley *v.* Schenck, 1 Penn. (N. J.) 75; Smith *v.* Canfield, 8 Mich. 493. The names of the partners composing the firm should be distinctly stated. If the record does not show their Christian names or surnames, nor anything else upon which an amendment may be based, to render judgment by default is erroneous. Langford *v.* Patton, 44 Ala. 584.

But this rule is subject to exceptions. Thus, where the individual names appear in the petition, the name of the firm may be used in the citation or writ. Andrews *v.* Ennis, 16 Tex. 45; Tarleton *v.* Herbert, 4 Ala. 359.

In California, where the style of a firm in which they do business does not disclose the names of the partners, the firm cannot sue in their mercantile name until they have filed the certificate and made the publication required by the California Code, which on this point is explicit. Byers *v.* Bourret, 64 Cal. 73. And the filing of the certificate being alleged, the allegation must be proved. Sweeney *v.* Stanford, 67 Cal. 635.

In Illinois, the provision in Rev. Stat. (ch. 40, § 7) dispensing, where there is no plea in abatement, with the proof of partnership and of the names of the partners, in a suit brought by a firm, applies as well to suits commenced before justices of the peace as to those brought in the Circuit Court. Evans *v.* Fisher, 10 Ill. (5 Gilm.) 569.

In Iowa it is best to declare on a note made payable to a firm by its name, in the name of the firm; but if the individual names of the partners are set out, it is not necessary to prove them. Gordon

Where there have been no changes in the firm.—Where there have been no changes amongst the members of a firm since the cause of action accrued there is no difficulty in following the rules. The

v. Janney, 1 Morr. (Iowa) 182; Bernard *v.* Parvin, Id. 309.

In Nebraska, by Code, § 24, a partnership which is not incorporated, may sue in its firm name, but the procedure indicated by sections 25 and 26, must be strictly followed. In particular it must be shown that the company is formed for business purposes, &c., and is not incorporated, and security for costs must be given. Burlington, &c., R. R. Co. *v.* Dick, 7 Neb. 242. An attachment by a non-resident partnership, in the name of the firm, is not void. Cady *v.* Smith, 12 Neb. 628.

In North Carolina a judgment in favor of "L. & M.," trading as a firm, is valid, and is competent evidence, in a suit brought by the firm, that the judgment was recovered by the partnership, their individual names being set out in full. Lash *v.* Arnold, 8 Jones (N. C.) L. 91.

When firm may be sued in the mercantile name.—In Alabama a judgment against a partnership in its firm name alone will support an action against an individual member of the firm, to enforce his individual liability for the firm debts. Cox *v.* Harris, 48 Ala. 538. But the record must show the individual names of the several partners plaintiff; although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them unless denied by plea verified by affidavit, and also (section 2904) authorizes a suit against a partnership by its firm name. Moore *v.* Burns, 60 Ala. 269.

In Illinois, under the attachment law, partners may be sued in their firm name. U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

In Iowa, if a partnership is sued in the firm name, the code renders a *sci. fa.* necessary, in order to reach individual property. Hansmith *v.* Espy, 13 Iowa 439; Levally *v.* Ellis, Id. 544; Davis *v.* Buchanan, 12 Id. 575. And a partnership may be sued in the individual names of its members as well as in its copartnership name. Markham *v.* Buckingham, 21 Iowa 494; Johnson *v.* Smith, 1 Morr. (Iowa) 105. S. P., in Ohio, Abernathy *v.* Latimore, 19 Ohio 286.

On the other hand, in Indiana and New Jersey, partners cannot be sued in the name of the firm. Holland *v.* Butler, 5 Blackf. (Ind.) 255; Livingston *v.* Harvey, 10 Ind. 218; Faulkner *v.* Whitaker, 3 Gr. (N. J.) 438; while in Ohio a proper construction of section 1 of the "act regulating suits by and against companies and partners," authorizing suits by and against companies not incorporated, in the firm name, limits its operation to companies formed for and doing business or holding property within the State. Haskins *v.* Alcott, 13 Ohio St. 210.

Taking advantage of the defect.—T. and W. declare as partners, trading under the firm of T., W. & Co. If there be more than two partners, it can be shown only under a plea in abatement. Garner *v.* Tiffany, Minor (Ala.) 167.

A complaint brought in a firm's name, but not stating the names of the members of the firm as plaintiffs, is defective and can be demurred to, but the defect cannot be availed of by appeal. Gilman *v.* Cosgrove, 22 Cal. 356.

Where, in an action by partners doing

writ may be served either upon any one or more of the partners, or at the principal place of business of the firm, upon any person having the control or management of the partnership business there.(o) Appearances are entered by the partners in their own

business under a fictitious name, the complaint is perfect in all other respects, there is no failure to state facts sufficient to show a cause of action merely because it contains no statement that a certificate of partnership had been filed, as provided by Civil Code Cal., §§ 2466, 2468, attaching a legal incapacity to maintain an action upon any contracts made or transactions had in the partnership name to a failure to file such a certificate; and an objection that no such certificate has been filed, must therefore be taken by answer; otherwise, under Code Civil Pro. Cal., § 434, it is waived; affirming 13 Pac. Rep. 313. Phillips *v.* Goldtree (Cal.), 15 Pac. Rep. 451.

Where plaintiff, in fact, assuming to act, not as a corporation, but as a partnership, sues by a name importing a corporation, the point may be raised by an answer alleging want of parties in interest to the suit. Heaston *v.* Cincinnati, &c., R. R. Co., 16 Ind. 275.

Where a non-resident firm is sued in its firm name, and answers, and a verdict is taken upon the defence set up in the answer, without objection to the irregularity, the defendants will be deemed to have waived their strict legal right to object. Brownson *v.* Metcalfe, 1 Handy (Ohio) 188.

If a partnership be sued by its firm name without naming its members, the defect is cured by verdict; and if a suit is in the firm name the court will presume it after verdict to be in the name of real persons when the contrary does not appear. Seitz *v.* Buffum, 14 Pa. St. 69; Pate *v.* Bacon, 6 Munf. (Va.) 219.

A summary process in South Carolina, brought in the mercantile name of a firm, without setting out the partnership or the Christian names of the partners, is bad upon exception by plea, but not on motion for nonsuit. Martin *v.* Kelly, Cheves (S. C.) 215.

Pleading the partnership, setting out names, &c.—In a suit by the plaintiff as assignee of a firm, on a promissory note against the maker, the declaration need not state the names of the persons composing the firm. Smith *v.* Blatchford, 2 Ind. 184.

In an action by partners or against partners, as such, the complaint must allege the partnership. Foerster *v.* Kirkpatrick, 2 Minn. 210.

Suit was brought in the name of "Hanson Gregg, Albert Torrain and Mason Gregg, late copartners, under the firm name and style of Gregg, Torrain & Co., plaintiffs." On demurrer the suit was held not brought under the provisions of Gen. Stat. Neb., c. 57, § 24, and it was not necessary that plaintiffs should allege that the partnership "was formed for the purpose of carrying on trade or business, or for the purpose of holding any species of property in this State." Smith *v.* Gregg, 2 N. W. Rep. (N. S.) 459; S. C., 9 Neb. 213.

In an action by partners of the same surname, it is not error if it is not added to every Christian name. Chance *v.* Chambers, 1 Penn. (N. J.) 384.

(o) Ord. IX., r. 6. See, as to foreign firms, Pollexfen *v.* Sibson, 16 Q. B. D. 792; Baillie *v.* Goodwin, 33 Ch. D. 604; and as to lunatics, Fore Street Ware-

names, but subsequent proceedings continue in the name of the firm. (*p*) If all the members of the firm have properly appeared, judgment may be entered up against the firm, (*q*) but not otherwise. (*r*)

Where there have been changes.—Where changes have occurred amongst the members of the firm since the cause of action accrued, little, if any, advantage is derived from using the name of the firm. If an action is brought against a firm, which the plaintiff knows has been dissolved before the commencement of the action, the writ must be served upon all the persons sought to be made liable. (*s*) If, as sometimes happens, the plaintiff sues a firm and obtains judgment against it, without having discovered that any changes have occurred in it since the cause of action accrued, he may find himself in a difficulty when he seeks to enforce his judgment. In such a case it may well happen that the person against whom he seeks to enforce it is not one of those mentioned in Ord. XLII., r. 10, and is, in fact, not liable to execution without further proceedings, if at all. (*t*)

A debt due from a firm under a judgment recovered against *it in its mercantile name cannot be attached under the garnishee orders. (*u*) [*267

It frequently happens that there are reasons which prevent the joinder as plaintiffs of all who *prima facie* ought to be joined; in such a case those who cannot be so joined may be made defendants. Thus, if a firm has a cause of action, and one member has improperly released it, the other members can nevertheless maintain the action, joining him as a defendant, so that justice may be done both to the plaintiffs and to their opponents. (*x*) [2]

house Co. *v.* Durrant & Co., 10 Q. B. D. 471.

(*p*) Ord. XII., r. 15.

(*q*) Ib. Jackson *v.* Litchfield, 8 Q. B. D. 474.

(*r*) Adam *v.* Townsend, 14 Q. B. D. 103; Jackson *v.* Litchfield, 8 Q. B. D. 474; Munster *v.* Cox, 10 App. Cas. 680, affirming Munster *v.* Railton, 11 Q. B. D. 435. As to execution, see *infra*, § 3.

(*s*) Ord. XVI., r. 14.

(*t*) See Munster *v.* Cox, 10 App. Cas. 680, and *infra*, § 3, as to execution.

(*u*) Walker *v.* Rooke, 6 Q. B. D. 631.

(*x*) See the cases in the next note.

2. Where there have been changes in the firm.—The general rule is that all the partners must join as plaintiffs in an action to enforce a partnership claim; and this whether the action is

Two firms with common partner.—Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm;(*y*) nor why, if two

brought before or after the dissolution of the partnership. Cochran *v.* Cunningham, 16 Ala. 448; Dob *v.* Halsey, 16 Johns. (N. Y.) 34; Gage *v.* Rollins, 10 Metc. (Mass.) 348; Gallot *v.* McCluskey, 18 La. Ann. 259; Holt *v.* Kernodle, 1 Ired. (N. C.) L. 199; Shutts *v.* Chaffee, 48 Wis. 617; Snodgrass *v.* Broadwell, 2 Litt. (Ky.) 353; Wright *v.* Williamson, 2 Penn. (N. J.) 978. Where one of the partners refuses to join in an action for the enforcement of a firm claim, he may be made a defendant with the partnership debtor, in a suit brought by his copartner. Hill *v.* Marsh, 46 Ind. 218.

A suit on a firm claim may be maintained in the firm name, though one partner may be entitled to the proceeds, if the claim itself has not been applied to extinguish the debt due such partner. White *v.* Savery, 50 Iowa 515.

Where, after the institution of suit in the names of the members of a firm, one of them dies, it is not error to file subsequently a declaration in the names of all of them, and then suggest the death of the deceased member. Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199.

A commercial firm cannot demand in the same suit the payment of two promissory notes, although they are dated at the same place and on the same day, and both payable to the firm under its firm name, where it is shown that such firm was composed of different persons, when the indebtedness was created which formed the consideration of one note, from those persons who composed the firm when the indebtedness was incurred which formed the consideration of the other note. It would be a case of distinct creditors joining in the same action their separate and distinct demands against the debtor. Dyas *v.* Dinkgrave, 15 La. Ann. 502.

If one partner is omitted as plaintiff, and made a party defendant with another person not a partner, and not representing the interests of one, the court will not have equity jurisdiction as it respects the latter. Reed *v.* Johnson, 24 Me. 322.

Where there were one hundred partners who had executed separate mortgages to the firm to secure the debts of the concern, and some of the partners were dead, leaving numerous representatives, it was held that assignees of such mortgages might foreclose by separate suits against each partner, without making the others parties. Boisgerard *v.* Wall, 1 Smed. & M. (Miss.) Ch. 404.

Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record. M'Gregor *v.* Cleveland, 5 Wend. (N. Y.) 475.

Where a suit is brought by several as partners, and one of them proves not to have been a partner and not a proper party, a verdict for all cannot be sustained. Travis *v.* Tobias, 8 How. (N. Y.) Pr. 333.

After a guaranty had been made to a firm, one of its members retired, and the other partners paid the whole debt that the guarantor had stipulated to relieve the firm of. *Held*, that the late partner was not an improper party to a suit on the guaranty. Brown *v.* Haven, 37 Vt. 439.

(*y*) Piercy *v.* Fynney, 12 Eq. 69; Taylor *v.* Midland Rail. Co., 28 Beav.

firms have a common partner, an action should be maintained by one firm against the other; not, perhaps, in their mercantile names, but by those members of one firm which are not common to both against the members of the other firm; *e. g.*, if there are two firms, A, B & C and A, D & E, an action may, it is conceived, be now maintained by A, B & C against D and E, or by B and C against A, D & E, or *vice versa*. (*z*) [3]

287, and 8 H. L. Cas. 751, show that suits in equity would lie in these cases in aid of legal rights. See, also, Luke *v.* South Kensington Hotel Co., 11 Ch. D. 121; Williamson *v.* Barbour, 9 Ch. D. 536, per Jessel, M. R.

(*z*) Before the Judicature acts such actions could not be maintained. Bosanquet *v.* Wray, 6 Taunt. 598; 1 Wms. Saund. 291, *h*. But suits in equity could. See the cases in the last note. See, as to the non-application of this rule at law to companies, Bosanquet *v.* Woodford, 5 Q. B. 310. As to estimating damages sustained by one firm by reason of being prevented from completing a contract made with another firm, some members being common to both, see Waters *v.* Towers, 8 Ex. 401.

3. Two firms with common partner.—At common law no action will lie, by one copartnership against another copartnership, where one of the partners is a member of both firms. Englis *v.* Furniss, 4 E. D. Smith (N. Y.) 587; Burley *v.* Harris, 8 N. H. 235; Calvin *v.* Markham, 4 Miss. 343; Eastman *v.* Wright, 6 Pick. (Mass.) 321; Griffith *v.* Chew, 8 Serg. & R. (Pa.) 30; Green *v.* Chapman, 27 Vt. 236; Graham *v.* Harris, 5 Gill & J. (Md.) 489; Haven *v.* White, 39 Ill. 509; Portland Bank *v.* Hyde, 11 Me. 196; Rogers *v.* Rogers, 5 Ired. (N. C.) Eq. 31; Denny *v.* Metcalf, 28 Me. 389.

An adjudication in bankruptcy against persons as members of one firm, does not bar or defeat proceedings against them as partners with others in another firm. Re Jewett, 7 Biss. (U. S.) 328; Id. 473; 16 Bank. Reg. 48.

A was a member of the firm of A & B, and also of the firm of A & C. *Held*, that A, B and C could not be joined in one bankruptcy proceeding, even though A & C had undertaken to pay the debts of A & B. Re Wallace, 12 Bank. Reg. 191.

An action at law cannot be maintained by the members of a firm, on a written obligation for the payment of money to them, where one of the obligors is a member of the firm. Tindall *v.* Bright, Minor (Ala.) 103.

Where two different firms are composed of the same persons, they may be sued jointly or separately, and this whether they transact business in one or more firm names, and a judgment may be rendered against them as individuals. Hunt *v.* Semonin, 79 Ky. 270.

Under the statute of Mississippi declaring all notes joint and several, a member of a firm may be a coplaintiff in a suit on a promissory note against another firm of which he is partner, provided he is not also joined in the action as defendant. Morris *v.* Hillery, 7 How. (Miss.) 61.

Where three firms, having each a distinct name, keeping separate books and doing a separate business, consist of the same persons, and upon the bankruptcy of one firm its claims against one of the

Defences to actions by partners founded on the conduct of one of them.—As a general principle, what a person has no right to do himself he cannot acquire a right to do by associating others with him. (*a*) Thus, it being a rule that a trustee cannot claim from his *cestui que trust* compensation for trouble or loss of time in the execution of the trust, it has been held that if one *of a firm
*268] of solicitors is a trustee, and the firm acts as solicitors in the matter of the trust, the firm cannot claim payment for his services, the disability of one of its members thus extending to them all. (*b*) So, if one member of a firm is guilty of fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. (*c*) So, if one partner resident abroad sells partnership goods, and he knows they are to be smuggled into this country, and he is privy to their being so smuggled, then, although his copartners are innocent, the

others, also bankrupt, is sold by the assignee and by the purchaser proved against the debtor firm, he cannot afterwards proceed by suit for the debt against either of the partners. Buckner *v.* Calcote, 28 Miss. 432.

Where a person is a member of two partnerships, his separate creditors have a preference over his interest in the property of one of the firms as against creditors of the other firm. Weaver *v.* Weaver, 46 N. H. 188.

A judgment obtained by one firm against another, each of which is constituted in part of members belonging to both firms, thus being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. Tassey *v.* Church, 6 Watts & S. (Pa.) 465.

Where the same person is a member of two firms, his acts, done in the name of one of the firms, cannot be proved in an action against the other firm, the same persons not comprising both firms. Kratzer *v.* Lyon, 5 Pa. St. 274.

Mr. Bell, in his Commentaries (vol. II. (5th ed.) 620), says: "In Scotland debts between companies in which the same individual is a partner are every day sustained, as quite unexceptionable." It is to be lamented that the like rule has not been incorporated into the common law, treating the firm, for the purposes of the suit, as an artificial body, or *quasi* corporation. It would be highly convenient, and certainly conformable to the common sense of the commercial world. Story Part., § 236, *n.*

(*a*) See, in addition to the cases cited *infra, ante* pp. *116, *117, and Solomons *v.* Nissen, 2 T. R. 674.

(*b*) See Broughton *v.* Broughton, 2 Sm. & G. 422, and 5 De G., M. & G. 160; Christophers *v.* White, 10 Beav. 523; Collins *v.* Carey, 2 Id. 128; Matthison *v.* Clarke, 3 Drew. 3. See the exception in cases of litigation, Cradock *v.* Piper, 1 Macn. & G. 664, and Re Corsellis, 34 Ch. D. 675.

(*c*) See Kilby *v.* Wilson, Ry. & M. 178.

firm cannot recover the price of such goods. (*d*) So, if one of several partners draws a bill in his own name, and the bill is accepted upon condition that he will provide for it when due, he cannot, by endorsing that bill to the firm to which he belongs, entitle himself and his copartners to sue upon it. (*e*) In Astley *v.* Johnson one of three partners purchased a bill in the partnership name, and undertook to pay for it at the end of a month. He remitted the bill to his copartners in England, and they sued upon it. The bill, however, had not been paid for as agreed, and it was held that the plaintiffs were not entitled to recover and were in no better position without their copartner than they would have been had he been a coplaintiff in the action. (*f*) [4]

(*d*) Biggs *v.* Lawrence, 3 T. R. 454.

(*e*) Sparrow *v.* Chisman, 9 Barn. & C. 241; and see Richmond *v.* Heapy, 1 Stark. 202.

(*f*) Astley *v.* Johnson, 5 Hurlst. & N. 137.

4. Defences to actions by partners founded on the conduct of one of them.—Where one partner, in the usual course of business, obtains money in the name of the firm, the other partner cannot defend on the ground that the money was obtained without his knowledge, and fraudulently converted to his own use by the partner obtaining it. Gilchrist *v.* Brande, 38 Wis. 184.

Lord Tenterden, in delivering the judgment of the court in Jones *v.* Yates (9 Barn. & C. 532), said: "These were two actions brought by the plaintiffs, as assignees of Sykes & Bury. The first was an action of trover to recover the value of three bills of exchange, which belonged to Sykes & Bury, and which Sykes had endorsed to the defendants, with whom he had been in partnership, in part payment of a demand, due from him to the partnership of Sykes, Yates & Young, and by him again immediately endorsed in the name of that partnership to Alzedo, who was a creditor of the firm. The second action was to recover money drawn by Sykes from the funds of himself and Bury, and paid into the hands of Yates, in further discharge of the balance before mentioned, without the knowledge of Bury. Both the transactions were frauds by Sykes, on his partner, Bury, and it must be taken that Yates (at least when the bills were endorsed and the money paid) knew the bills and money came from the funds of Sykes & Bury, without the knowledge of Bury. It may be doubtful whether Young was actually privy to either transaction; but in our view of the case that point is not material. On behalf of the defendant, it was contended that Sykes & Bury could not (if they had continued solvent) have maintained any action against Yates & Young, in respect of either of these transactions; and that, if that were so, the plaintiffs, their assignees, could not sue, they having no better remedy at law than Sykes & Bury would have had. And we are of this opinion. It is unnecessary, therefore, to advert to any of the other points raised in the argument at the bar. We are not aware of any instance in which

Surviving partners prejudiced by conduct of deceased partner.— In such cases as these the inability of the firm to sue is not removed by the death of the partner who has created the inability.

a person has been allowed, as plaintiff in a court of law, to rescind his own act on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed, on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor. So that, in this case (if it be held that Sykes & Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act, by alleging his own misconduct. The defrauded partner may perhaps have a remedy in equity, by a suit in his own name against his partner, and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct. There is a great difference between this case and that of an action brought against two or more partners on a bill of exchange, fraudulently made or accepted by one partner in the name of the others, and delivered by such partner to a plaintiff in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say, in a court of law, that although the partner may for many purposes bind him, yet, that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law. Then, if Sykes & Bury could not sue, how could the plaintiffs, who represent them here? It was said, in support of the argument, that the property did not pass from Sykes by his wrongful act, but remained in Sykes & Bury. This was ingeniously and plausibly put; but, as against Sykes, the property did pass at law, and there was no remedy at law for Bury to recover it back again. He could not do so without making Sykes a party. Further, the right of the assignees to sue in this case was said to be analogous to the right of assignees to sue for, and recover back, property voluntarily given by a bankrupt to a particular creditor, in contemplation of his bankruptcy, in favor of such creditor, and in preference to him, in which case the bankrupt could not have sued, if no commission had issued, yet the assignees are allowed to do so. That is a case where the representatives could, where the party represented could not, sue, and it is the only instance of the kind mentioned at the bar that has occurred to us. But, if we attend to the principle on which the assignees are allowed to sue, we shall find there is no analogy between that case and the case before the court; for the principle on which assignees have been held entitled to recover in such cases is not on the ground of fraud on any particular person, but on the ground that there has been fraud on the bankrupt laws, which are made for the purpose of effecting an equal distribution of the insolvent's estate among all the creditors, and which purpose would be defeated if a party on the eve

Thus, in Ex parte Bell, (*g*) one of a firm advanced money of the firm to a stranger for an illegal purpose, and it was held, after the death of the partner who advanced the *money, that the survivors could not recover it from the person to whom it was lent. So, if a firm has become bankrupt, its trustee is in general in no better position than the partners themselves would have been in, and is therefore frequently liable to be defeated on similar grounds. (*h*) But the trustee of a bankrupt partner can disaffirm and avoid such of his acts as are fraudulent as against his creditors, and consequently acts of this nature afford no defence to an action by the trustee and the solvent partner. Thus, in Heilbut *v.* Nevill, (*i*) a solvent partner and the assignees of a bankrupt partner successfully maintained an action for a bill of the firm, given by the bankrupt to a creditor of his own, under circumstances which amounted to a fraudulent preference. [*269

Frauds by one partner on the firm.—Owing to the old technical rules relating to the joinder of parties to actions, the principle above discussed was, moreover, applied at law to cases where it produced great injustice, viz., to cases where one partner acted in fraud of his copartners. For example, where a partner pledged partnership property, and in so doing clearly acted beyond the limits of his authority, still, as *he* could not dispute the validity of his own act, it was held at law that he and his copartners could not recover the property so pledged. (*k*) So, although a partner has no right to pay his own separate debt by setting it off against a debt due from his creditor to the firm, yet if he actually agreed that such set-off should be made, and it was made accordingly, it was held at law that he and his copartners could not afterwards recover the debt due to the firm. (*l*) So, where a firm of three partners deposited goods upon

of a bankruptcy, and with a view to it, could distribute his effects according to his own pleasure among some favorite creditors, to the total exclusion of the others. This is mentioned by Lord Mansfield as the principle of the decisions in the early cases on this subject. Alderson *v.* Temple, 4 Burr. 2235; Harman *v.* Fishar, Id. 2237; S. C., Cowp. 117. For these reasons, we think the plaintiffs are not entitled to recover."

(*g*) 1 Man & S. 751. See, also, Brandon *v.* Scott, 7 El. & B. 237, and compare Innes *v.* Stephenson, 1 Moo. & R. 147.

(*h*) Jones *v.* Yates, 9 Barn. & C. 532.

(*i*) L. R., 4 C. P. 354.

(*k*) Brownrigg *v.* Rae, 5 Ex. 489.

(*l*) See Wallace *v.* Kelsall, 7 Mees. &

the terms that they were not to be parted with except on the joint authority of all three partners, and they were nevertheless given up to one of them, it was held at law that the firm could sustain no action for the recovery of the goods. (*m*) In such cases, as observed by Lord Tenterden, in Jones *v.* Yates, (*n*) there is no instance

*270] *"in which a person has been allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person."

In such cases as these, however, relief might have been had in equity; (*o*) and it is apprehended that the cases at law above referred to can no longer be relied upon, the Judicature acts having removed the technical difficulties which led to their decision.

If a partner in collusion with a debtor to the firm gives him a receipt for his old debt although no payment or anything equivalent to payment is made, an action for the recovery of the debt is nevertheless maintainable by the firm, *i. e.*, by the partner giving the receipt and his copartners. (*p*) For a receipt does not preclude the person giving it from showing that the money therein expressed to be received was not in fact received, (*q*) nor does it discharge the debt. Again, a right of set-off which might be pleadable to an action brought by one partner is not pleadable to an action by him and his copartners; (*r*) nor, if one partner covenants not to sue for a partnership debt, will this preclude him from joining with his copartners in an action for the recovery of that debt. (*s*) In each of these cases there is only a right of cross action against the one partner; and although such right might be relied on as a defence to

W. 264; Gordon *v.* Ellis, 7 Man. & G. 607. Compare Kendal *v.* Wood, L. R., 6 Ex. 243, where the technical difficulty did not arise.

(*m*) Brandon *v.* Scott, 7 El. & B. 234.

(*n*) 9 Barn. & C. 532, and see Richmond *v.* Heapy, 1 Stark. 202.

(*o*) Piercy *v.* Fynney, 12 Eq. 69; Midland Counties Rail. Co. *v.* Taylor, 8 H. L. Cas. 751, affirming Taylor *v.* Midland Counties Rail. Co., 28 Beav. 287.

(*p*) Henderson *v.* Wild, 2 Camp. 561; Farrar *v.* Hutchinson, 9 Ad. & E. 641.

(*q*) Skaife *v.* Jackson, 5 Dowl. & R. 290, and 3 Barn. & C. 421.

(*r*) See *infra*, book II., ch. 3, § 2.

(*s*) See Walmsley *v.* Cooper, 11 Ad. & E. 216.

an action by him alone, it is held not to affect the firm to which he belongs.[5]

Result of the decisions.—The conclusion to be drawn from the foregoing cases appears to be that the conduct of one partner affords a defence to an action by him and his copartners, or by them without him, where they are bound by this act, either by adopting and seeking the benefit of it, (*t*) or upon the ground that it is, on *ordinary principles of agency, the act of the firm, and [*271 binding upon him and his copartners accordingly. But the cases at law which go further than this cannot, it is submitted, be now relied upon.

Power of one partner to act for the firm.—The power of one partner to act for the firm in legal proceedings may be conveniently noticed in the present place.[6]

5. Frauds by one partner.—Where one of two partners makes fraudulent representations, whereby goods are obtained and consigned to his partner, replevin in the *cepit* lies against both. Olmsted *v.* Hotailing, 1 Hill (N. Y.) 317.

(*t*) As in Ex parte Bell, 1 Mau. & S. 751; Broughton *v.* Broughton, 5 De G., M. & G. 160.

6. Power of one partner to act for the firm.—Though partners may bind each other in the course of trade, they cannot compel each other to appear in suits, nor undertake to represent each other in courts of law. Hills *v.* Ross, 3 Dall. (U. S.) 331. But when a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit; and an appearance, entered by such an attorney, will be binding upon the other partners. Bennett *v.* Stickney, 17 Vt. 531.

Partners cannot, by articles of agreement between themselves, invest such person as a majority of them shall afterwards appoint with power to sue in his own name for moneys agreed to be contributed by each partner to the general fund. Fortune *v.* Brazier, 10 Ala. 791.

A promise to one of a firm, to refund money belonging to the firm, inures to the benefit of the firm, and an action for it should be brought by the firm. Creel *v.* Bell, 2 J. J. Marsh. (Ky.) 309.

Where, by the terms of the partnership agreement, one of the partners is to provide a certain sort of merchandise for the firm, and he contracts therefor individually, the seller may sue him alone or sue the firm, at his option. Sylvester *v.* Smith, 9 Mass. 119.

Both partners must join in an action of replevin for property attached on a writ against one of them only; nonjoinder of one in such a case may be pleaded in bar. Fay *v.* Duggan, 135 Mass. 242; Saul *v.* Kruger, 9 How. (N. Y.) Pr. 569.

Where a debt due a partnership is assigned to one of the partners, all the partners must be joined in a bill to recover the debt. Gaither *v.* Caldwell, 1 Dev. & B. (N. C.) Eq. 504; Russell *v.* Swan, 16 Mass. 314.

One partner suing in the name of the firm.—A partner may sue in the name of himself and copartners without their consent, (*u*) but if he sues against their consent he must indemnify them against the costs. (*x*) So, one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners. (*y*) [7]

(*u*) Whitehead *v.* Hughes, 2 Cromp. & M. 318; and see Harwood *v.* Edwards, Gow on Part. 65, note, where it was held by Chapple, J., that the action must be considered as brought by all. See below, note (*z*).

(*x*) Whitehead *v.* Hughes, 2 Cromp. & M. 318.

(*y*) In Goodman *v.* De Beauvoir (12 Jur. 989 and 1037) a solicitor employed by a managing committee to defend a suit was held authorized to enter an appearance for a member of a provisional committee, who had made the managing committee his agents. See, further, as to the authority of one partner to enter an appearance for his copartner, Harrison *v.* Jackson, 7 T. R. 207; Morley *v.* Strombom, 3 Bos. & P. 254; Goldsmith *v.* Levy, 4 Taunt. 299. The authority has been doubted in America. See Hall *v.* Lanning, 1 Otto (U. S.) 160.

7. One partner suing in name of firm.—The right of a partner to collect the debts of the partnership, and to commence suits for that purpose, is an incident to the partnership, which survives the dissolution, and is inherent in either partner. Ward *v.* Barber, 1 E. D. Smith (N. Y.) 423.

Any partner has the right to use the firm name in perfecting a mechanic's lien for the firm; and the validity of such lien is not impaired by the fact that before the filing of the account for that purpose in the firm name, one of the partners had become sole owner of the claim, of which fact the account contained a recital declaring that he alone was entitled to the benefit of the lien. Jones *v.* Hurst, 67 Mo. 568.

When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit; and an appearance, entered by such attorney, will be binding upon the other partners. Bennett *v.* Stickney, 17 Vt. 531. See, also, Wheatley *v.* Tutt, 4 Kan. 240.

The entry by an attorney, of his general appearance for the defendants, in an action against a partnership, must be construed to be an appearance for the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally and personally, so as to render a judgment against the partnership, in such action, binding on an individual partner in another jurisdiction, by whom such appearance was not authorized. Phelps *v.* Brewer, 9 Cush. (Mass.) 390.

After the dissolution of a partnership, one of the parties cannot authorize an appearance for the other. Haslet *v.* Street, 2 McCord (S. C.) 311; Loomis *v.* Pearson, Harp. (S. C.) 470.

One partner has no authority, after dissolution, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Bowler *v.* Huston, 30 Gratt. (Va.) 266.

One partner staying proceedings.—But if it is competent for one partner to sue for the firm, it is as competent to any other partner to stay proceedings or to put an end to the action altogether by means of a release; and although the court will not allow this to be done by collusion with the defendant for the purpose of defrauding the other partners of their rights (see *ante* p. *145), a release will be effectual where there is no fraud in the case.

In Harwood *v.* Edwards (*z*) one of three partners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterwards agreed with the defendant that proceedings should be stayed, and the court held that this agreement bound all three, and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles it had been agreed between the partners that one *of them should not give a release without the assent of the others. *272]

Consenting to arbitration.—If an action is brought for the recovery of a debt due to the firm, one of the partners cannot bind the firm by consenting to a judge's order referring all matters in difference between the plaintiffs and the defendant to arbitration. (*a*)

Consenting to judgment, &c.—In an action against a firm it has been held that one partner has no authority to bind the firm by consenting to an order for judgment against it, (*b*) or by giving a *cognovit* to pay the debt and costs. (*c*) But a warrant of attorney executed by one partner in the name of the firm, with the consent of the other partners, is not invalid, simply because the others have not executed it. (*d*) [8]

(*z*) Gow on Part. 65, note.

(*a*) Hatton *v.* Royle, 3 Hurlst. & N. 500.

(*b*) Hambridge *v.* De la Crouée, 3 C. B. 742. See, also, Munster *v.* Cox, 10 App. Cas. 680.

(*c*) Rathbone *v.* Drakeford, 4 Moo. & P. 57, and 6 Bing. 375.

(*d*) Brutton *v.* Burton, 1 Chitty 707.

8. **Consenting to judgment, &c.**—The general rule is that one partner cannot bind his copartners by a confession of judgment, without their consent. Christy *v.* Sherman, 10 Iowa 535; Edwards *v.* Pitzer, 12 Id. 607; North *v.* Mudge, 13 Id. 496; Crane *v.* French, 1 Wend. (N. Y.) 311; Barlow *v.* Reno, 1 Blackf. (Ind.) 252; Everson *v.* Gehrman, 1 Abb. (N. Y.) Pr. 167; Shedd *v.* Bank, &c., 32 Vt. 709; Remington *v.* Cummings, 5 Wis. 138. To the contrary, Lahey *v.* Kingon, 13 Abb. (N. Y.) Pr.

Costs.—If in an action costs are ordered to be paid to one partner, payment to another partner is not sufficient. (*e*)

Service on one partner.—One partner is not the agent of his co-

192; 22 How. Pr. 209. Such judgment will bind the partner who confessed it, and be void as to the others. Bennett *v.* Marshall, 2 Miles (Pa.) 436; Bitzer *v.* Shunk, 1 Watts & S. (Pa.) 340; Herrick *v.* Conant, 4 La. Ann. 276; Mitchell *v.* Rich, 1 Ala. 228; Morgan *v.* Richardson, 16 Mo. 409; Sloo *v.* State Bank, 1 Scam. (Ill.) 428; York Bank's Appeal, 36 Pa. St. 458.

Thus, a prior judgment confessed by two of three partners, for a firm debt, is a lien upon the interest of the two in the firm property, and is superior to subsequent judgments recovered against the whole firm. Stevens *v.* Bank of Central New York, 31 Barb. (N. Y.) 290.

Where one of the partners of a firm executed a warrant of attorney, under seal, for himself and as attorney for his partner, authorizing the confession of a judgment, the court refused to set aside the judgment on the sole application of the defendant, who had executed the warrant of attorney. St. John *v.* Holmes. 20 Wend. (N. Y.) 609.

A declaration was served on one partner only, and he employed an attorney, and authorized him to give a *cognovit*, which he did for both, in good faith. The attorney being responsible, the court refused to set aside the judgment, but permitted the partner who had not been brought in to contest the validity of the claim. Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437. Otherwise, where the attorney is irresponsible. Groesbeck *v.* Brown, 2 How. (N. Y.) Pr. 21.

Where partners are sued, one of them has no power to offer judgment under the code, on behalf of himself and his copartner, without some evidence that his copartner authorized him to make the offer or assented to it, but the appearance of an attorney for both on the record may make the judgment regular. Binney *v.* Legal, 19 Barb. (N. Y.) 592.

Under Oregon Code 202, § 252, a judgment by confession of one partner does not bind his copartners in the partnership property, unless made in an action pending. Richardson *v.* Fuller, 2 Oreg. 179.

A confession of judgment by one partner for a partnership debt, does not discharge the other partners from liability for the same debt, since the act of April 6th, 1830. Kauffman *v.* Fisher, 3 Grant (Pa.) Cas. 302

But the other partners may ratify the act of the one confessing the judgment. Thus, where a warrant of attorney to confess a judgment was executed in the firm name of the defendants, it was held, on error, that the court would intend that the warrant, although executed by one partner only, was adopted by the others. Bissell *v.* Carville, 6 Ala. 503. And where a bond with a warrant to confess judgment is executed by one partner, and subsequently all the partners revive the judgment by their attorney, it is a ratification. Overton *v.* Tozer, 7 Watts (Pa.) 331; Cash *v.* Tozer, 1 Watts & S. (Pa.) 519. So, also, a judgment confessed by one of two copartners, using a corporate namae, my

(*e*) Showler *v.* Stoakes, 2 Dowl. & L. 3. But as to payment out of money in court, see the Sup. Ct. Funds Rules, 1886, r. 63.

partner, except as to partnership matters; and if one partner is sued in respect of some private affair of his own, he must be proceeded against like any other individual, and service of writs, &c., must be made accordingly, and they must not be left at the place of business of the firm to be served on the other partners. (*f*) And even in proceedings relating to partnership matters, although service on one partner is sometimes held equivalent to service on all,

bind the other, if the circumstances create a belief that he knew of it and intended to be bound. Bivingsville Manuf. Co. *v.* Bobo, 11 Rich. (S. C.) 386.

In some jurisdictions one partner may bind the firm by this means. Thus, under N. Y. Laws 1833, 395, ch. 271, judgment against partners may be entered, upon service on and confession by one only; but will be a lien, and can be enforced only against the joint property of the defendants, and the individual property of the defendant served. Kidd *v.* Brown, 2 How. (N. Y.) Pr. 20; Stoutenburgh *v.* Vandenburgh, 7 Id. 229. Compare, also, Matter of Lowenstein, 7 How. (N. Y.) Pr. 100.

A judgment against one partner is a bar to an action against both partners, though the new defendant was a dormant partner not discovered till after the judgment. Smith *v.* Black, 9 Serg. & R. (Pa.) 142.

A judgment confessed by one partner in favor of his copartner, to secure him for capital advanced to the concern, is valid against the judgment of a private creditor of the partner who confessed the judgment. Purdy *v.* Lacock, 6 Pa. St. 490.

Though one partner cannot confess a judgment against another partner, even for a partnership debt, yet a creditor of the firm cannot be permitted to make objection to the judgment on that account; and a sale of partnership property, on an execution issuing from such judgment, will pass a perfect title to the purchaser; and, if the first lien, will be entitled to the proceeds of the sale; but the judgment will not affect the persons nor the separate property of the other partners. Grier *v.* Hood, 25 Pa. St. 430.

In Ross *v.* Howell (84 Pa. St. 129) it was held that the interest of all the partners in the firm property may be sold under an execution upon a judgment confessed by a single partner in the firm name, and for a firm debt.

An injunction issued in a suit by a partner, prohibiting the other partners from meddling with the partnership property, will not prevent creditors of the firm from proceeding at law to recover their debts, nor will it restrict any member of the firm from confessing a judgment to such creditors, so as to give them preference in payment. Hewitt *v.* Patrick, 26 Tex. 326.

(*f*) See Petty *v.* Smith, 2 You. & J. 111; Fairlie *v.* Quin, 1 Smythe 189. See, as to substituted service, Lees *v* Martin, 13 Eq. 77, and, as to delivering a solicitor's bill of costs, Eggington *v.* Cumberledge, 1 Ex. 271.

this is not the case where the service is relied on as the foundation of process of contempt or of any proceedings of a penal nature. (*g*) [9]

*Having made these general observations, it will be convenient to consider, in the first place, the general rules [*273

(*g*) Young *v.* Goodson, 2 Russ. 255; and see Moulston *v.* Wire, 1 Dowl. & L. 527; Re Holiday, 9 Dowl. 1020; Grant *v.* Prosser, Sm. & B. 95; Murray *v.* Moore, 1 Jones Ir. Ex. 129; Nolan *v.* Fitzgerald, 2 Ir. C. L. R. 79; Kitchen *v.* Wilson, 4 C. B. (N. S.) 483. In Leese *v.* Martin, 13 Eq. 77; Carrington *v.* Cantillon, Bunb. 107; and Coles *v.* Gurney, 1 Mad. 187, service of a bill on one partner was allowed, the other being abroad; and in ejectment against a firm, service on an acting partner is sufficient (Doe *v.* Roe, 9 Dowl. 1039), and in an action against a firm on its promissory note, the order to compute (after judgment by default), need only be served on one of the defendants. Fiegins *v.* Ward, 2 Cromp. & M. 424; Carter *v.* Southall, 3 Mees. & W. 128.

9. **Service on one partner, when binds the firm.**—The weight of authority is to the effect that service of process on one partner, in an action against the firm, is not equivalent to service upon all. Beal *v.* Snedicor, 8 Port. (Ala.) 523; Duncan *v.* Tombeckbee Bank, 4 Port. (Ala.) 181; Demoss *v.* Brewster, 12 Miss. 661; Faver *v.* Briggs, 18 Ala. 478; Rice *v.* Doniphan, 4 B. Mon. (Ky.) 123; Scott *v.* Bogart, 14 La. Ann. 261. And will not be notice to them. Demoss *v.* Brewster, 12 Miss. 661.

In Alabama, in an action against a firm, setting out the individual names of the several partners, the present statute (Rev. Code, § 2538), unlike the former (Clay's Dig. 323, § 63), does not authorize a judgment by default against all the defendants, when process was served on a portion of them only. Shapard *v.* Lightfoot, 56 Ala. 506.

As to the effect of the acceptance of service of process by one partner, see Bowen *v.* Sutherlin, 44 Ala. 278; Clark *v.* Stoddard, 3 Ala. 366; Demott *v.* Swain, 5 Stew. & P. (Ala.) 293; Bright *v.* Sampson, 20 Tex. 21; Freeman *v.* Carhart, 17 Ga. 348.

In some jurisdictions, however, the rule is not strictly applied. Thus, in Iowa, service upon one member of a firm is sufficient to give the court jurisdiction over the other members of the firm. Gregory *v.* Harmon, 10 Iowa 445; Walker *v.* Clark, 8 Iowa 474; Saunders *v.* Bentley, Id. 516.

In Louisiana, persons associated together for carrying personal property for hire in vessels, are commercial partners, and may be cited in the manner prescribed for the citation of such associations; but it is only where they are associated together under a title, or as a firm, that the service of a citation addressed to the partnership in its social name, made on one of its members only, is sufficient. Hefferman *v.* Brenham, 1 La. Ann. 146. Thus, suit being brought against R. F. and C. W., as composing the commercial firm of R. F. & Co., and the petition and citation served on R. F. alone, it was held that the service of citation was sufficient as to both partners. Kearney *v.* Fenner, 14 La. Ann. 870.

In some other states, also, firm property, or the separate property of the partner served, may be subjected to the

which apply to actions by and against partners when there has been no change in the firm between the time when the right sought to be

debts of the firm by service of citation on one member of the firm. Alexander *v.* Stern, 41 Tex. 193; Hale *v.* Van Saun, 18 Iowa 19; Flannery *v.* Anderson, 4 Nev. 437; Brooks *v.* McIntyre, 4 Mich. 316; Kidd *v.* Brown, 2 How. (N. Y.) Pr. 20; Stoutenburgh *v.* Vanderburgh, 7 Id. 229. See, also, In re Lowenstein, 7 How. (N. Y.) Pr. 100.

Even after dissolution such service has been held good. Thus, it has been decided that where a firm or its survivors are sued, it is not necessary to pray process against all of them, nor is a return of *non est inventus* necessary to bind the interests in the partnership effects of those not served (Printup *v.* Turner, 65 Ga. 71), and that a service of notice upon one member of a firm after dissolution, if sued as partners, would be sufficient to give the court jurisdiction of the parties, so far as to authorize a judgment against the firm, as such, to be satisfied out of the joint property, or the separate property of the partner served. Hale *v.* Van Saun, 18 Iowa 19.

But the better opinion is that after the dissolution of the partnership, service upon one of the partners, in an action against all as late partners, is not a service upon the others. Beal *v.* Snedicor, 8 Port. (Ala.) 523; Faver *v.* Briggs, 18 Ala. 478. Thus, a service made on one partner after dissolution is clearly insufficient in a case where the interest of the partner upon whom the service is made is adverse to that of the partners who are not served with notice. Stephens *v.* Parkhurst, 10 Iowa 70. And a judgment rendered in a sister state against all the members of a firm after dissolution, does not personally bind a partner not served and who did not appear in the case, although the other partners were served, or appeared and caused an appearance to be entered for all. Bowler *v.* Huston, 30 Gratt. (Va.) 266. So, also, where a defendant is sued as silent partner in a commercial firm, service of citation on the clerk of the firm is not sufficient. Ridge *v.* Alter, 14 La. Ann. 866.

Rights of those not served.—Where one only of a firm is served, the judgment will bind the firm's real estate and that of the partner served, but will not bind the separate property of those not served. Patten *v.* Cunningham, 63 Tex. 666.

Where a state statute provides that in suits against two or more jointly indebted, the judgment shall be evidence, as against those not served with process, only of the extent of the plaintiff's demand, the original demand against the parties not brought into court is not merged in the judgment against those who were. Mason *v.* Eldred, 6 Wall. (U. S.) 231.

Two of several mining partners mortgaged their interest in the mining property to plaintiff, and subsequently defendants brought an action against the partnership for supplies furnished. Two of the partners were not served with summons, and did not appear. The action was not brought under Code Civil Pro. Cal., § 388, which provides for the suing of associates transacting business under a common name, by such name; service upon one being service upon all, and the judgment binding the joint property of all the associates. *Held*, that under Code Civil Pro. Cal., § 414, providing that "where an action

enforced accrued, and the time when proceedings are taken to enforce it; and then to consider how far those rules apply or have to be modified when a change has taken place.

is against two or more defendants, jointly or severally liable, and the summons is served on one or more, but not on all, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants," the partners not served were not bound by the judgment, and the partners who were bound having mortgaged their interest to plaintiff before the judgment was obtained by defendants, such mortgage was a prior lien upon the property. Golden State and Miners' Iron Works *v.* Davidson (Cal.), 15 Pac. Rep. 20.

Where, in a suit against partners on a partnership debt, there is a regular return of service as to one, and no return whatever as to the other, the latter may come in even as late as the regular trial term, acknowledge due service, waive copy and previous entry of service, and consent that the case then stand for trial. Judgment rendered at or after the second term succeeding the entering and signing of such acknowledgment on the declaration will affect third persons the same as if the evidence of service had been complete in the first instance. Oates *v.* Brown, 59 Ga. 711.

In an action against partners, on only a part of whom process has been served, a plea filed for defendants generally, without naming them, will not be considered as the plea of all. Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498.

Where, in an action on a claim for supplies furnished to a steamer, the proceedings are not *in rem*, and the owners are not shown to have had a social name, and citation was served on but one of the two owners, the judgment, though rendered against the part owner who was cited, and against the steamer itself, cannot be executed by seizing the whole boat. The part owner who was not cited, and made no appearance, must be regarded as a stranger in the proceedings; and he may, by an opposition, under article 395 *et seq.* of the Louisiana Code of Practice, arrest the sheriff in any attempt to seize his share of the boat to satisfy the judgment; and he is not bound to notice the proceedings until an attempt is made to seize his share of the boat. Hefferman *v.* Brenham, 1 La. Ann. 146.

Where a suit is brought against a firm, the name of one of the partners composing which is alleged to be unknown, a judgment cannot be rendered against the firm so far as concerns the unknown partners; but where the other partner, not having been personally cited, appeared and filed a general denial, and, upon judgment being rendered against the firm, appealed as a partner, it was held that he was bound by the decree. Grieff *v.* Kirk, 15 La. Ann. 320.

If firm property has been *bona fide* conveyed to one, it cannot be subjected to a judgment against the firm to which he was not made a party, upon a mere suggestion, on an attempt to levy on the property, that he was a copartner, as that would be to bind him as partner without notice of suit, and without any regular proceeding against him as such. Strong *v.* Hines, 35 Miss 201.

Incidental matters of practice.—If all the partners made defendants in an

2. *Actions by and against partners where no change in the firm has occurred.*

A. *Actions in respect of legal rights.*

(a) *Actions by the firm.*

Actions ex contractu.

In order to determine who ought to sue on behalf of a firm upon a contract made with it, it is necessary to distinguish between

1. Contracts under seal.
2. Bills of exchange and promissory notes.
3. Other contracts.

1. *Actions by partners on contracts under seal.*—As regards contracts under seal, the old rule was that if such a contract was en-

action have not been served with process, the plaintiff may discontinue against those not served. Clark *v.* Stoddard, 3 Ala. 366; Earbee *v.* Evans, 9 Port. (Ala.) 295. But under Tex. Rev. Stat., art. 1346, authorizing a judgment against a partnership, and against such of the partners as have been actually served, and prohibiting a personal judgment against a partner not served, where one partner only is served, a formal discontinuance as to the other is unnecessary to the validity of a judgment against the firm. Burnett *v.* Sullivan, 58 Tex. 535.

While in an action against partners judgment should not be rendered against those not served with process, still such a judgment, though erroneous, is valid as against those served. Davidson *v.* Knox, 67 Cal. 143.

Suit was brought against a firm to collect an alleged partnership debt. Service was had on one partner only, and judgment was rendered against him as for an individual debt. *Held*, that he was not a party to the suit, and it was error to render a judgment against him alone. Craig *v.* Smith (Colo.), 15 Pac. Rep. 337.

In a suit against two as partners, where service is made only on one, and the officer returns *non est inventus* as to the other, if the one served dies, the plaintiff may, under the act of 1820, make his legal representatives parties, and proceed to judgment and execution against them. Ross *v.* Everitt, 12 Ga. 30. S. P., Wright *v.* Harris, 24 Ga. 415.

The declarations of a partner as to whom the suit was dismissed for want of service are inadmissible in a suit against the firm to prove the partnership of the defendants as against the other partners. Rimel *v.* Hayes, 83 Mo. 200. But in Pennsylvania, in an action against partners, if only one has been served with process, evidence may be given by the plaintiff of the declarations of the one not served. M'Coy *v.* Lightner, 2 Watts (Pa.) 347.

tered into with one partner only, he alone could sue upon it; and that if it was entered into with more than one partner, all those with whom it was expressly entered into must sue upon it, and no others could, whatever their interest in its performance might be. (*h*) But their joinder will now be of no consequence unless the defendant is prejudiced by it. (*i*)

*274] **Covenant with A & Co.*—It is apprehended that a covenant entered into with A, B & Co. may be sued upon by the persons who, when the covenant was made, constituted that firm.[10]

2. *Actions by partners on bills and notes. Blank endorsements.*—As regards bills of exchange and promissory notes. If they have been endorsed in blank, any person holding them may sue upon them. (*k*)

Special endorsements.—When a bill or note is not endorsed in blank, the proper persons to sue upon it are those named in the instrument as drawers, payees or endorsees, as the case may be. (*l*) Whether they are partners or not is of no consequence, and therefore if a bill is drawn in the name of two persons as if they were partners, they ought both to join in an action on the bill, although

One copartner cannot authorize an appearance for another. Haslet *v.* Sheet, 2 McCord (S. C.) 310. And, if one partner appears, and the other makes default, the regular mode of proceeding is for the plaintiff to get judgment for the whole debt, against the one appearing, and to execute the writ of inquiry against the one making default, for the whole also. Simpson *v.* Geddes, 2 Bay (S. C.) 533. See Hills *v.* Ross, 3 Dall. (U. S.) 331.

(*h*) See the note to Cabell *v.* Vaughan, 1 Saund. 291, *i;* Metcalf *v.* Rycroft, 6 Mau. & S. 75; Scott *v.* Godwin, 1 Bos. & P. 67; Vernon *v.* Jeffreys, 2 Str. 1146.

(*i*) Ord. XVI., r. 11.

10. Actions by partners on contracts under seal.—In a suit on an obligation payable to himself "& Co.," plaintiff, who carries on business as a firm using after his name "& Co.," must allege and prove that he alone is interested in the business, or he will be non-suited. Ferguson *v.* King, 5 La. Ann. 642.

(*k*) See Ord *v.* Portal, 3 Camp. 239; Attwood *v.* Rattenbury, 6 Moore 579; Lowe *v.* Copestake, 3 Car. & P. 300. See, also, Law *v.* Parnell, 7 C. B. (N. S.) 282, in which the manager of a joint stock bank was held entitled to sue, in his own name, on a bill endorsed in blank and given to him by a customer of the bank on account of advances made by it to him. Machell *v.* Kinnear, 1 Stark. 499, is rendered unimportant by Ord. XVI., rr. 1 and 11.

(*l*) See Pease *v.* Hirst, 10 Barn. & C. 122.

one of them has no interest in it. (*m*) So it is immaterial whether the bill or note relates to partnership matters or not, for if a debtor to a firm makes his promissory note payable to one of the partners only, such one is the proper person to sue on the note. (*n*)

Bills in name of A & Co.—If a bill is drawn by or in favor of a firm in its commercial name, the persons who composed the firm when the bill was drawn ought to be plaintiffs. (*o*) But they can now sue in their mercantile name. (*p*)

Bills accepted for honor.—If one partner in his own name accepts a bill drawn on a stranger, for his honor, and pays the bill, when due, out of the funds of the partnership, with the consent of his copartners, the partner who accepted the bill is the proper person to sue the drawee for indemnity. (*q*)[11]

(*m*) Guidon *v.* Robson, 2 Camp. 302. *Sed quære* now. See Ord. XVI.

(*n*) Bawden *v.* Howell, 3 Man. & G. 638.

(*o*) McBirney *v.* Harran, 5 Ir. L. Rep. 428; Phelps *v.* Lyle, 10 Ad. & E. 113.

(*p*) *Ante* p. *265.

(*q*) Driver *v.* Burton, 17 Q. B. 989.

11. Actions by partners on bills and notes.—In a suit by several, on a note payable to a firm, proof that they compose the firm is only called for where the title of plaintiffs is put in issue by a plea sworn to. Rees *v.* Simons, 10 Ind. 82; Hauser *v.* Smith, 13 Ind. 532; Shepherd *v.* Frys, 3 Gratt. (Va.) 442; Bell *v.* Crosby, 4 Ala. 575; Pratt *v.* Willard, 6 McLean (U. S.) 27; Smith *v.* Davis, 2 Stew. (Ala.) 224; Smith *v.* Hunt, Id. 222. But in an action on a note endorsed specially to a firm (the plaintiffs), the partnership must be proved. Boswell *v.* Dunning, 5 Harr. (Del.) 231; Ege *v.* Kyle, 2 Watts (Pa.) 222.

In a suit by a partnership on a note and mortgage executed to the firm, the showing of the copartnership relation of the plaintiffs is not indispensable in the caption, if in the body of the complaint it be specifically averred that the plaintiffs are in fact copartners, and it appears, from the facts alleged, that the obligation relied upon is one that has been created in favor of such copartnership. Wise *v.* Williams (Cal.), 14 Pac. Rep. 204.

Where a note payable to order is endorsed by the payee, and transferred to two persons, who bring an action thereon as "H. & A. F. Randolph, partners," &c. *Held*, that plaintiffs, being the lawful holders of the note, if not partners, could, in their individual names, maintain an action thereon as "H. & A. F. Randolph." Walgamood *v.* Randolph (Neb.), 35 N. W. Rep. 217.

In Guidon *v.* Robson (2 Camp. 302), the case being an action by Guidon alone against Robson, upon a bill of exchange, drawn in the name of Guidon & Hughes (the latter being a mere clerk of Guidon) on Robson, and accepted by him, Lord Ellenborough said: "There being such a person as Hughes, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a part-

3. *Actions by partners on ordinary contracts.*—With respect to other simple contracts, whether written *or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it. (*r*) But if a simple contract, written or verbal, expressed or implied, has been entered into with an agent, it may be sued upon by his principal, even if undisclosed, provided he can show that in point of fact the agent contracted on his behalf. (*s*)[12] [*275

ner, as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm for the purpose of gaining credit. But where the name of a real person is inserted with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person. The variance is fatal."

(*r*) 1 Wms. Saund. 291, *k*, and 1 Chit. Pl. 10, 15. Formerly, mistakes in this respect were fatal, but see now Ord. XVI., r. 11.

(*s*) See Phelps *v.* Prothero, 16 C. B. 370; Sims *v.* Bond, 5 B. & Ad. 389. See, also, Beckham *v.* Drake, 9 Mees. & W. 79, and 11 Id. 315, noticed *ante* p. *178, and Trueman *v.* Loder, 11 Ad. & E. 589, as to suing undisclosed principals on written contracts. Foreign principals, as a rule, do not enter into contracts in this country through agents. The agents here themselves contract as principals, though acting for others. See Elbinger Actien Gesellschaft *v.* Claye, L. R., 8 Q. B. 313; Hutton *v.* Bullock, L. R., 8 Q. B 331, and 9 Id. 572.

12. Actions by partners on ordinary contracts.—Where partners sue upon a promise, and the general issue is pleaded, the burden devolves upon the plaintiffs to prove every fact necessary to maintain their action, and they must show a joint promise to all of them. Burr *v.* Morrison, 8 B. Mon. (Ky.) 131: Roberts *v.* Atwood, Id. 209; Ardley *v.* Russell, 1 Browne (Pa.) 145; Patten *v.* Whitehead, 13 Rich. (S. C.) 156. But see Heintz *v.* Cahn, 29 Ill. 308.

All the partners should join in the suit. On this subject Lord Tenterden says: "In the case, however, of an action for the freight of goods conveyed in a general ship, all the part owners ought to join, or if they do not, the defendant may avail himself of the objection by evidence at the trial, and without plea in abatement, according to the general rule of law and the distinction between contracts and wrongs; unless, perhaps, some one should have received his own share, or have released his claim to it. The necessity of all the part owners joining as plaintiffs in the suit, in this case, is founded upon the consideration that all of them are partners with respect to the concerns of the ship; and upon this consideration, the present Lord Chancellor (Eldon), in a case of bankruptcy, wherein it appeared that the owners of a ship, upon a settlement of accounts with the master, who had become a bankrupt,

All may sue, though not named.—This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it

were indebted to him, and that on the other hand he also was indebted to some of them severally upon separate and distinct concerns, refused to allow the latter to set off their respective demands against the claim of his assignees for their shares of the general debt." Abbott on Shipping (5th ed.), pt. 1., c. 3, § 14, p. 82.

In an action by plaintiffs claiming as partners, it is a good defence under the general issue to show that the debt is due to one of them only. The statute of Alabama, dispensing with the proof of a partnership, unless put in issue by plea in abatement, does not apply to such case. Kenan *v.* Starke, 6 Ala. 773.

Where parties do not sue as partners, the statute of Illinois does not dispense with proof of their joint interest upon a general denial. Woodworth *v.* Fuller, 24 Ill. 109.

Where the plaintiffs sue jointly as partners, but not on any contract with the defendant as partners, or on negotiable paper, they must prove partnership *inter se*, and joint right to and interest in the subject of suit. And the question is, where the partnership is put in issue, whether the plaintiffs are partners as between themselves, not whether they have made themselves liable as partners to third parties. Gray *v.* Gibson, 6 Mich. 300.

A firm may sue as such for compensation for what it has done, even though outside the scope of the partnership business. Tiernan *v.* Doran, 19 Neb. 492.

If partners, as partners, are sureties for one who died insolvent, and a judgment against them on the note is satisfied by levy on the separate estate of one of them, the claim against the estate of the deceased principal is correctly made by and in the name of the partners. Parker *v.* Gregg, 3 Fost. (N. H.) 416.

In a suit upon a written contract entered into by plaintiff to do certain work, for the price of the work, the defendant may show that plaintiff had a partner in the job, and that such partner had been paid in full. Shepard *v.* Ward, 8 Wend. (N. Y.) 542.

In an action by a partnership upon a debt due the firm, it is necessary for the plaintiffs to prove that they are the persons constituting the firm, unless that fact, being stated in the declaration, is not denied in the affidavit of the defendant. Barnes *v.* Elmbinger, 1 Wis. 56.

Illustrations.—Where a suit was brought in the name of certain persons, as composing a commercial firm, and the defendant excepted to the petition, upon the ground that all the members of the firm had not been joined in the action, it was held that where it was shown that the name of one of the persons used in the style of the firm was omitted, the burden of proof was on the plaintiffs to show that they alone composed the firm. Rugely *v.* Gill, 15 La. Ann. 509.

Where a vessel was built by several individuals, and advances were made by two part owners, who were partners, out of the partnership funds, the liability of the other owners for such advances is to the firm, and not to the several members of it. Stevens *v.* Lunt, 19 Me. 70.

Four persons formed a partnership in the ice business, under the name of G.,

is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people. The question is: With whom was the contract made in point of law? And the true answer to this question does not by any means entirely depend on the answer to be given to the more simple question, With whom was the contract made in point of fact?

Thus, in Garrett *v.* Handley, (*t*) all the members of a firm were held entitled to sue on a written guarantee given to one of the partners only, there being evidence to show that the guarantee was intended for the benefit of the firm. So, where a member of a firm of bankers was asked for a loan, and he made it out of the funds of the bank, it was held that an action for the recovery of the money lent was properly brought by all the members of the firm, although the borrower had not requested any loan from the bank. (*u*)

*276] So, where one partner *sells goods belonging to the firm, (*x*) or does work (*y*) of the kind he and his copartners undertake, an action for payment may be maintained by him and them jointly, although the person to whom the goods were sold, or for

H. & Co, and transacted their business in Charlestown (Mass.) The same persons and C., afterwards, by written articles, formed a partnership, under the name of C. & Co., in the business of shipping ice to Mobile (Ala.), and selling it there. By these articles G., H. & Co. were to ship ice to Mobile, consigned to C. & Co., and C. was to devote his personal attention to the sale of the ice there, and C. & Co. were to pay from the proceeds of the sales, to G., H. & Co., a certain price per ton for the ice shipped at Charlestown, and also to pay rent for an ice-house at Mobile, and all freights and expenses on the ice shipped, and all expenses of discharging and transporting it from the vessels to the ice-house, and all other expenses of taking care of and selling it; and the proceeds of the sales, after deducting all said expenses, were to be divided equally between C. and the firm of G., H. & Co. R. made an agreement with the firm of G., H. & Co. to transport a cargo of ice for them from Charlestown to Mobile, but did not fulfill his agreement, and the four members composing that firm brought an action against him to recover damages for breach of that agreement. *Held*, that the action could not be maintained without joining C. as a plaintiff. Gage *v.* Rollins, 10 Metc. (Mass.) 348.

(*t*) 4 Barn. & C. 664. See the same case, 3 Barn. & C. 462, where an action by the one partner failed. See Hopkinson *v.* Smith, 1 Bing. 13, as to actions by attorneys not retained by the defendant.

(*u*) Alexander *v.* Barker, 2 Cromp. & J. 133; Sims *v.* Britain, 4 B. & Ad. 375, and Sims *v.* Bond, 5 Id. 389.

(*x*) Skinner *v.* Stocks, 4 B. & A. 437.

(*y*) Townsend *v.* Neale, 2 Camp. 189; Arden *v.* Tucker, 4 B. & Ad. 817.

whom the work was done, knew nothing of the other partners. In Cooke *v.* Seeley (*z*) a partner had an account at a bank in his own name, but there was evidence to show that it was a partnership account, and was known to the bankers to be so, and under these circumstances it was held that all the partners were entitled to sue the bankers for dishonoring a cheque drawn on them by the one partner for partnership purposes.[13]

(*z*) 2 Ex. 746.

13. **All may sue, though not named.** —Upon this subject, Mr. Gow, in his treatise on Partnership (ch. 3, § 1, pp. 121–123), says as follows: "Partners sometimes seek to enforce a guaranty given to secure the repayment of an advance to be made by the firm. In such a case the action must necessarily be brought by all the partners to whom the guaranty is given, and by whom the advance is made. And where a contract of that description is apparently entered into in favor of one partner only, yet in fact if it be intended as an indemnity to the firm, in respect of an advance to be made by them, a joint action may be maintained. Thus, in the late case of Garrett *v.* Handley, 4 Barn. & C. 664, which was an action on a guaranty by two, as the survivors of a firm of three partners, it appeared that the guaranty was addressed to one of the partners only; but evidence was produced which established that the advance to secure which the guaranty was entered into, was made by the firm, and that the guaranty was given for their joint benefit and not to indemnify the single partner only. It was objected at *Nisi Prius*, and afterwards insisted upon on a motion to enter a nonsuit, that there was a misjoinder; for, as the guaranty was in terms given to one partner, to whom alone the promise could be construed to have been made, the action should have been brought by him only. But the Court of King's Bench held that as the guaranty was proved to have been intended for the benefit of the firm, the action was properly brought by the surviving partners; and, under such circumstances, it is not competent to the partner to whom the guaranty may have been addressed, to treat the advance as one made by himself on his individual account, and in that character to support a separate action. This was determined in a previous action on the same guaranty, and in which the plaintiff declared that in consideration that he would advance a sum of money to A B, the defendant promised that provision should be made for paying the plaintiff. At the trial it appeared that the defendant had given to the plaintiff the guaranty stated in the declaration, and that the latter was a partner with two other persons in a banking-house, and that the firm had advanced the money; and charged A B in account with the same; and it was held that the averment in the declaration, that the plaintiff had advanced the money, was not sustained by the proof, there being no evidence to show that the money had been advanced to the plaintiff by the firm, and by him to A B. It is not to be collected from either of the two preceding cases, nor was it in fact necessary to determine whether the partner to whom the guaranty was actually given could have maintained a separate action upon it, provided his declaration so truly and

Dormant partners.—It follows from the principle on which these cases were decided, and although formerly doubted, (*a*) it is now

correctly stated the facts, as not to have been open to the objection of a variance between the allegation and the proof. But judging from analogy to the rule applicable to a policy of insurance, which allows the action to be brought either by the party for whose benefit it was effected or in the name of him who effected it, it would seem that that partner, as being the party with whom the contract was made, might have supported such an action."

In Alexander *v.* Barker (2 Cromp. & J. 133, 138) Baron Bayley, speaking of the case of Garrett *v.* Handley, cited above, says: "I have no doubt in this case but that this action is maintainable by the plaintiffs; and in that opinion I am fortified by the case of Garrett *v.* Handley. Here D. Alexander stood in the double capacity of an individual and a member of the firm. Barker wanted an advance of money, and to him it was quite immaterial by whom the advance was made, whether by D. Alexander alone, or by the house of which he was a member. He applies to D. Alexander to make the advance. He does not qualify that application and say, 'You may be a member of a firm, and I will deal with you only, and will not be answerable to other persons;' but he makes his application without any qualification. By thus applying generally, he entitles D. Alexander, if he makes the advance, to place him in the situation of being answerable to him in either of his capacities, according to that in which he makes the advance. From the testimony it appears that the advance was made by D. Alexander, not individually, but with the money of the firm. He accepted, therefore, the application for the advance, not as an individual, but in his capacity as a member of the firm. In Garrett *v.* Handley the contracting partner first brought the action in his own name; but it appeared that the advance was made by the house, and the court said, 'You did not make the advance and cannot maintain the action.' Another action was then brought in the name of the firm, and the court being of opinion that the guaranty was intended to apply to advances made by the firm, thought that the action was maintainable. The language of that guaranty was much more pointed than this letter. It was addressed to an individual, and was to this effect: 'I understand from Mr. G., that you have had the goodness to advance £550, &c., upon my assurance, which I hereby give, that provision shall be made for repaying you this sum,' &c. But the advance was not made by the individual alone; and it was holden that the firm by whom the advance was made ought to sue. It appears to me, therefore, that the plaintiffs were the persons who might and ought to sue in this case." And again he says: "I am the less surprised that the learned judge should have considered D. Alexander as the person with whom the defendant contracted, and who alone could maintain the action, because I remember that it was at one period the impression of Lord Ellenborough that where money was lent by a partner, the action must in all cases be brought by the individual with whom the contract was made. But he was afterwards convinced of what is

(*a*) See Mawman *v.* Gillett, 2 Taunt. 325; Lloyd *v.* Archbowle, Id. 324.

clearly established that dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members. (*b*)

But a dormant partner never *need* be joined as a coplaintiff in an action on a contract entered into with the firm or with one of its members. (*c*)[14]

Position of nominal partners.—*Nominal* partners, *i. e.*, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were, never need join as plaintiffs in an action on an ordinary contract not under seal. (*d*) If a partner retires and leaves his name in the firm, it is not necessary that he should be a coplaintiff in an action brought by the continuing partners in respect of what has happened since the retirement. (*e*)

doubtless the true rule, viz., that where a contract is made by one on behalf of others, the action may be brought in the name of the principals."

Where one of several partners, to whom an indemnity is given, is compelled by legal proceedings to pay out moneys on account of a demand against his firm, the action to recover back the moneys thus paid may be brought in the name of all the members of the firm. Hill *v.* Packard, 5 Wend. (N. Y.) 375.

(*b*) Cothay *v.* Fennell, 10 Barn. & C. 671. See, also, *ante* notes (*s*) and (*t*); Robson *v.* Drummond, 2 B. & Ad. 303, per Littledale, J.

(*c*) Leveck *v.* Shafto, 2 Esp. 468, action for work and labor. See Phelps *v.* Lyle, 10 Ad. & E. 113, as to contracts with the "directors" of a company.

14. Dormant partners as plaintiffs. —Ordinarily, a dormant partner need not join in an action brought in behalf of the firm by the ostensible partner, against a person who dealt with the latter only. Wood *v.* O'Kelly, 8 Cush. (Mass.) 406; Clarkson *v.* Carter, 3 Cow. (N. Y.) 84; Clark *v.* Miller, 4 Wend. (N. Y.) 628; Rogers *v.* Kichline, 36 Pa. St. 293; Curtis *v.* Belknap, 21 Vt. 433; Desha *v.* Holland, 12 Ala. 513; Sylvester *v.* Smith, 9 Mass. 119; Wilson *v.* Wallace, 8 Serg. & R. (Pa.) 55; Hilliker *v.* Loop, 5 Vt. 116; Cleveland *v.* Woodward, 15 Vt. 302; Blin *v.* Pierce, 20 Vt. 25; Hagar *v.* Stone, Id. 106; Waite *v.* Dodge, 34 Vt. 181. An ostensible partner may maintain an action in his own name, without joining a dormant partner, although the latter was known to the defendant when the debt was contracted, and actually sold him the goods, for the price of which the action was brought. Monroe *v.* Ezzell, 11 Ala. 603. But a dormant partner must join with his active partner in a suit for work and labor done by the firm. Secor *v.* Keller, 4 Duer (N. Y.) 416. To the contrary, Speake *v.* Prewitt, 6 Tex. 252.

(*d*) Kell *v.* Nainby, 10 Barn. & C. 20. See, also, Spurr *v.* Cass, L. R., 5 Q. B. 656, where the contract was in writing and with the nominal partner.

(*e*) Cox *v.* Hubbard, 4 C. B. 317.

Where nominal partners must sue.—But if a nominal partner's name is on a bill of exchange or promissory note, he ought to be a party to the action brought *upon it; and the same rule applies to actions on contracts under seal. (*f*) [*277

Actions by one partner.—One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm; (*g*) and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each ought to sue alone for repayment of his advance, although the loans may have been made in pursuance of some arrangement with all the partners; for each loan creates a separate debt to each partner, and the several loans do not together form one debt to the firm. (*h*) Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done. (*i*)[15]

(*f*) Guidon *v.* Robinson, 2 Camp. 302.

(*g*) See Skinner *v.* Stocks, 4 B. & A. 437, and Cothay *v.* Fennell, 10 Barn. & C. 671. See, also, Cawthron *v.* Trickett, 15 C. B. (N. S.) 754, as to actions by a master and part owner of a ship on bills of lading, and Agacio *v.* Forbes, 14 Moo. P. C. 160, in the privy council, where it was held that one partner might maintain an action upon an agreement in writing made with him alone, although the agreement related to the business of the firm, and was, in truth, for its benefit, and the consideration was a release by the partner in question of a debt due to the firm.

(*h*) See Thacker *v.* Shepherd, 2 Chitty 652; Brand *v.* Boulcott, 3 Bos. & P. 235.

(*i*) Brandon *v.* Hubbard, 2 Brod. & B. 11.

15. Actions by one partner—when one may not sue.—One partner cannot prosecute an action at law in his own name against a debtor of the firm to recover his share of the debt. Vinal *v.* West Virginia Oil, &c., Co., 110 U. S. 215. Nor will an account in favor of a firm support a bill in equity by one of the partners only, unless it appears on the face of the bill, either that the other partner is dead, or that he has parted with his interest. Frost *v.* Shackleford, 57 Ga. 260; Hatzenbuhler *v.* Lewis, 51 Mich. 585. And even in that case it must be shown that the debt to the firm has been extinguished, and a new liability assumed to the plaintiff alone; and if a new contract be made, it must be declared on specially. De Grott *v* Darby, 7 Rich. (S. C.) 118.

There is no rule of pleading or practice which authorizes a recovery by one partner in his own name, on what his partners agree is his share of a debt due the firm. In all cases of indebtedness to a firm, the action must be brought by the members of the firm; nor does an

Covenant with one partner.—Again, if a partner enters into a contract under seal for the payment of money and the money is paid out of the funds of the firm, and it then appears that the con-

agreement to divide the claims among themselves change the right. American Cent. R. R. Co. *v.* Miles, 52 Ill. 174.

Thus, an action for goods sold, which belonged to a partnership at the time of the sale, must be brought in the name of all the partners, although the defendant was, at the time of the purchase, ignorant of the existence of the partnership. Bennett *v.* Scott, 1 Cranch (U. S.) C. C. 339. And even though the firm business is done in the name of one partner only. Wilson *v.* Wallace, 8 Serg. & R. (Pa.) 53. And the rule is not changed by the fact that the partner attempting to sue for a debt due the firm had previously agreed to be responsible to the other partner for the payment of the debt; there having been no settlement between the partners making the claim a separate one. Cushing *v.* Marston, 12 Cush. (Mass.) 431. So, also, one partner cannot sue in his own name to recover property of the firm fraudulently assigned by a copartner to his individual creditor. Miller *v.* Price, 20 Wis. 117.

Although one partner is not bound, singly, to pay a debt due from him and his partner, if when sued he plead in abatement the omission to join his partner in the action, yet he is not entitled to recover, in his own name, a partnership debt; and if he sue singly in his own name, the defendant may take advantage of it on the trial on the general issue. Jordan *v.* Wilkins, 3 Wash. (U. S.) 110.

So, also, where, on the dissolution of a firm, a third person acquires the interest of the surviving partner, he cannot maintain a suit in his own name for services rendered individually, and as a member of the firm. Mosgrove *v.* Golden, 101 Pa. St. 605.

When one may sue.—Where one partner, by express stipulation in the articles (for the cultivation of a farm for a term of years), has "a lien on the produce of the said farm, and upon the stock and mules on said farm, to secure the payment of" the other partner's notes for a half interest in them, and is authorized "to control the crops grown on said farm exclusively, and to sell the cotton," he may maintain detinue for the cotton in his own name. Pierce *v.* Jackson, 56 Ala. 599.

One partner can assign his interest in an open account due to the firm, to his copartner, and the latter may become the real party in interest, so as to maintain a suit on the account in his own name. Swails *v.* Coverdill, 17 Ind. 337; Cook *v.* Beech, 10 Humph. (Tenn.) 412. But see Horbach *v.* Huey, 4 Watts (Pa.) 455.

But an endorsement by one partner, in his individual name, to his copartner, of a promissory note payable to both of them or order, will not enable the endorsee to sue thereon in his own name. Estabrook *v.* Smith, 6 Gray (Mass.) 570.

One partner may recover his proportion of a debt due the firm, if the debtor and all the parties have agreed that the debt be severed and paid to him. Austin *v.* Walsh, 2 Mass. 401. Thus, where two partners agree to divide a partnership debt, and the debtor consents to it, and promises one of the partners to pay a moiety to him, such partner may maintain an action for his moiety against the debtor. Blair *v.* Snover, 10 N. J. L. 153.

tract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money. (*k*) Lastly, if one partner acting for the firm has represented himself to be acting on his own account only, and has ostensibly entered into a contract on his own account, he alone ought to sue on it. (*l*)

The Judicature acts and the rules promulgated under them have rendered it comparatively unimportant to consider whether *in any *278] given case all partners who can sue must do so, and whether an action should be brought in the name of one partner or of all; for mistakes on such matters are no longer fatal to an action. At the same time, mistakes create delay and expense, and attention ought therefore still to be paid to the points above adverted to; and if all the members of a firm sue when one only ought to do so, or one only sues when all ought to do so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out or the proper parties joined, as the case may be. (*m*) [16]

Stronger proof is required to prevent one partner from maintaining a suit in his own name than is sufficient to charge persons as partners when sued as defendants. Bishop *v.* Hall, 9 Gray (Mass.) 132.

Where two partners were compelled to pay a debt of a third person (the one as surety, and the other as the heir of a co-surety) from the partnership funds, it was held that a separate action might be maintained by each against the principal for a moiety of the money so paid. Gould *v.* Gould, 6 Wend. (N. Y.) 263.

One of two partners of a law firm may maintain an action where the business, respecting which a suit is brought, is uniformly done in the name of the party suing. A set-off will be allowed in such suit of a demand against the firm. Platt *v.* Halen, 23 Wend. (N. Y.) 456.

Where one allowed his partner to bring an action in his own name on a demand due the partnership—*Held*, that he could not impeach the title of another who had, in good faith and without notice, purchased the judgment recovered, from the former, who was plaintiff on the record. McCotter *v.* McCotter, 16 Abb. (N. Y.) Pr. 265; 25 How. Pr. 478.

(*k*) Lefevre *v.* Boyle, 3 B. & Ad. 877.

(*l*) Lucas *v.* De la Cour, 1 Man. & S. 249.

(*m*) See Ord. XVI., r. 11.

16. **Actions by one—covenant with one.**—An action for goods mortgaged to one partner, to secure an indebtedness to the firm of which he is a member, is rightly brought in the name of the mortgagee alone. Trott *v.* Irish, 1 Allen (Mass.) 481.

Where one partner, who was agent of his copartners, made a contract in his own name—*Held*, that he might sue on that contract without joining his part-

Actions ex delicto.

Actions by partners for torts.—With respect to actions by partners not founded on any breach of contract, or of *quasi* contract, but on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it;(*n*) whilst, on the other hand, several persons ought not to join in an action *ex delicto*, unless they can show a joint damage.(*o*)[17]

Actions for libel.—These doctrines are well illustrated by actions for libel. A libel on a firm can be made the subject of an action by the firm.(*p*) If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the party libeled, and the other by him and his copartners;(*q*) but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libeled partner only.(*r*) If one partner is libeled, and the firm cannot be shown to have been damnified, an action for the libel should be brought in the name of the individual partner *aggrieved, and not by the firm;(*s*) and he may sue alone, although the libel more [*279

ners. Elancy *v.* French, 1 Blackf. (Ind.) 353.

In an action upon a note payable to the order of the plaintiff alone, he was non-suited, on the ground that the evidence showed that the money for which the note was given was advanced, and the note given in pursuance of a contract between the defendants and a firm of which the plaintiff was a member; and that therefore the plaintiff could not maintain an action alone, even if his partner, as between themselves, had no interest in the note. *Held*, that the non-suit was error. Mynderse *v.* Snook, 53 Barb. (N. Y.) 234.

(*n*) See 1 Wms. Saund. 291, *m*; Addison *v.* Overend, 6 T. R. 766; Sedgworth *v.* Overend, 7 T. R. 279.

(*o*) 2 Wms. Saund. 116, *a*.

17. Generally.—One partner cannot recover against a sheriff for levying upon the firm property, on an execution against his copartner. Hughes *v.* Boring, 16 Cal. 81.

Where two sue as copartners for conversion of goods, the mere fact that it appears in evidence that plaintiffs are not copartners will not entitle the defendant to a verdict. Hine *v.* Bowe, 21 N. Y. Week. Dig. 558.

(*p*) See Cooke *v.* Batchellor, 3 Bos. & P. 150; Forster *v.* Lawson, 3 Bing. 452; Williams *v.* Beaumont, 10 Bing. 260; The Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 Hurlst. & N. 87.

(*q*) The two actions can now be combined in one. See Ord. XVIII., r. 6.

(*r*) See Harrison *v.* Bevington, 8 Car. & P. 708; and Forster *v.* Lawson, 3 Bing. 452; 2 Wms. Saund. 117, *b*; Haythorne *v.* Lawson, 3 Car. & P. 196.

(*s*) Solomons *v.* Medex, 1 Stark. 191.

particularly affects him in the way of his business.(*t*) Moreover, a general statement not clearly pointing to any particular person, but libelous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals.(*u*)[18]

(*t*) Harrison *v.* Bevington, 8 Car. & P. 708; Robinson *v.* Marchant, 7 Q. B. 918.

(*u*) Le Fanu *v.* Malcolmson, 1 H. L. Cas. 637.

18. **Actions for libel.**—In Forster *v.* Lawson (3 Bing. 452) Best, C. J., said: "An objection has been made to the declaration in this case, namely, that the action has been brought by three persons jointly, and that they could not properly join in such an action. The general rule of law is, as laid down in the case of Smith *v.* Cooker (Cro. Car. 512), namely, that where several persons are charged with being jointly concerned in a murder, each of them must bring a separate action for it; and the reason is that they have no joint interest to be affected by the slander. Where, however, two persons have a joint interest affected by the slander, they may sue jointly; and the case of Cooke *v.* Batchellor is not the first case which has determined this point. In the note in Saunders, to which the court has been referred, the learned editor states that two joint tenants or coparceners might join in an action for slander of the title to their estate, and the form of the declaration in such an action is to be found in Brownlow. This doctrine has also been recently considered and confirmed in the case of Collins *v.* Barrett, in which it was holden that two persons might bring a joint action for a maliciously holding them to bail, if the complaint in the declaration was confined to the expenses which they were jointly put to in procuring their liberty. It has been said that notwithstanding the judgment against the defendants in this action, if either of the plaintiffs has sustained any separate damage, he may still maintain a separate action. I cannot see how there can be any separate damage. The business injured is the joint business, and the libel only affects the plaintiffs through their business. If, however, a copartnership be libeled, and the libel contains something which particularly affects the character of one of that firm, I think a joint action may be maintained against the libeler, who would have less reason to complain of such proceedings than he would have if each partner brought a separate action for the injury done to the firm. Another objection raised by the defendant's counsel is that the plaintiffs have not stated the proportion of interest which each respectively had in their joint business. It is not necessary for them to do so; with their several proportions the defendant has nothing to do. Any compensation they may recover will belong to them generally, and it is nothing to the defendant how it may be divided among them. It has also been urged that the words contained in the paragraph are not actionable. I have no hesitation in deciding that to say of any bankers that they have suspended payment, is actionable. For what can be the meaning of such a statement, except that they are no longer

Consequence of non-joinder of partners.—An action for the recovery of goods of the firm, or for damages for their loss or injury, ought to be brought in the name of the firm or by all its members;(*x*) but if one only sues, he will be entitled to recover damages in respect of his interest in the goods;(*x*) and if, after he has done so, another action is brought by one of his copartners, that action cannot be stopped.(*y*)

Actions where one partner colludes with defendant.—If a person colludes with one partner in a firm to injure the other partners, the latter can jointly sustain an action against such person. Thus, where the bankers of a firm of four partners knew that one of them was in the habit of drawing bills in the name of the firm for his own private purposes, and the bankers colluded with him and kept his copartners in ignorance of what was going forward, and paid the funds, when due, out of the funds standing to the credit of

solvent? Saying that a banker has suspended payment is saying that he cannot pay his debts. A temporary inability to pay debts is insolvency. The charge of suspending payment is a charge of insolvency. Such a statement will instantly bring all the creditors of a banking-house upon it, and completely stop their business by preventing any one from taking their bills. But here special damage is stated, and I think correctly stated. It has been objected that the special damage is not set out with sufficient certainty. Even if that were so, advantage could be taken of it only by a special demurrer. In my opinion, however, the special damage is clearly and distinctly set out. The plaintiffs state that they had a number of promissory notes outstanding and in circulation, and that in consequence of these libels they were called upon and forced and obliged to pay those notes; how or when was not material, it being sufficient that they declare that they have thereby lost all the benefit and advantage which would otherwise have accrued to them in their trade and business, from the notes remaining outstanding and in circulation. The declaration goes even further; it states that the plaintiffs have suffered and sustained a great loss in raising and procuring sufficient money to pay and satisfy their several notes. It appears to me that the declaration is unobjectionable, and that the plaintiffs are entitled to judgment."

While a suit for oral slander will not lie against two or more jointly, yet a suit may be maintained against a firm the members of which have falsely and fraudulently recommended an insolvent person as worthy of credit, thereby inducing the plaintiff to sell such person goods on credit, which the defendants immediately seized for a debt due from such person to them. Patten *v.* Gunney, 17 Mass. 182.

(*x*) See Addison *v.* Overend, 6 T. R. 766; Bleadon *v.* Hancock, 4 Car. & P. 152. See Dockway *v.* Dickenson, Comb. 366.

(*y*) Sedgworth *v.* Overend, 7 T. R. 279.

the firm, it was held that an action lay against the bankers at the suit of the other three partners. (*z*)[19]

Actions of ejectment.—An action of ejectment for the recovery of real property belonging to the firm ought to be brought in the names of all those persons in whom the legal estate is vested. (*a*) If, however, one partner only has made a lease of the partnership property, then, as his title cannot be disputed by the lessee, notice to quit may be given and ejectment maintained *by the lessor alone; and if he alone has the legal estate, the circumstances that rent has been paid to the firm, and receipts for it have been given by all the partners, will not affect his right to give the notice and bring the action in his own name. (*b*)

*280]

(b) *Actions against the firm.*

Actions against partners.—In considering who ought to be sued in respect of a breach of contract committed by a firm, or some or one of its members, regard must be had in the first instance to the persons upon whom that contract is legally binding. This matter has been already discussed at length in the first and second chapters of the present book, and it is needless to repeat what has there been said. Assuming, therefore, the question of liability to be determined, it remains only to consider whether all the persons who are liable ought to be sued jointly, or whether any and which of them may be sued without the others. If there is any doubt on this question, the proper way is to sue them all, for this is now expressly authorized to be done. (*c*) In order, however, to save expense, the following rules will be found useful.[20]

(*z*) Longman *v.* Pole, Moo. & M. 223. Now, the other partner might be joined as a defendant. See *ante* p. *267, note (*y*).

19. Actions where one partner colludes with defendant.—Two of three partners may join in an action against the third partner and others, who, in collusion with such third partner, wrongfully and maliciously, and without probable cause, attached the property of the firm. Cochrane *v.* Quackenbush, 29 Wis. 376.

(*a*) See 1 Chitty on Plead. 74.

(*b*) See Doe *v.* Baker, 2 B. Moore 189.

(*c*) Ord. XVI., rr. 1, 4, 6. Honduras Rail. Co *v.* Tucker, 2 Ex. D. 301. See, also, Ord. XXI., r. 20, abolishing pleas in abatement.

20. In general.—Where a suit is brought against a firm upon a partnership debt, the names of the partners

Actions ex contractu.

Actions against partners on contracts.—All persons who are jointly liable on a contract ought to be sued jointly,(*d*) unless

must be proved; but slight evidence as to this will authorize the court to leave the question of partnership to the jury. Varnum *v.* Campbell, 1 McLean (U. S.) 313.

In an action against the makers of a note signed "A and B," it is unnecessary to allege a partnership between the makers, although that would be more technical. Davis *v.* Abbott, 2 McLean (U. S.) 29.

Where, on the face of the pleadings, the execution of a note declared upon as given to the plaintiffs as partners is admitted, proof of the partnership of plaintiffs is unnecessary. Pratt *v.* Willard, 6 McLean (U. S.) 27. See, also, Maret *v.* Wood, 3 Cranch (U. S.) C. C. 2.

Where several are sued as copartners, the plaintiff may discontinue at any time as to such, if any, as are not partners. Wheeler *v.* Bullard, 6 Port. (Ala.) 352; Guzzam *v.* Bebee, 8 Port. (Ala.) 49.

A creditor may sue one or all of the members of a firm, on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued. McCulloch *v.* Judd, 20 Ala. 703.

A plea of one sued as a partner on a note, that he was not a partner, and did not sign, nor authorize any one to sign for him, is a good plea in bar denying the note sued on. Holman *v.* Carhart, 25 Ga. 608.

To a suit against A and B, as partners, on a note signed "A," a plea by B that at the time he was not a partner, puts the *onus* on the plaintiff to prove that he was. Strauss *v.* Waldo, 25 Ga. 641.

Where, in an action against two as partners, it appears that there is no partnership, and that one of the defendants only is liable, the action does not abate, but may proceed against the one who is liable. Francis *v.* Dickel, 68 Ga. 255.

The question of partnership should be put in issue by a plea in abatement properly verified. Shufeldt *v.* Seymour, 21 Ill. 524; Warren *v.* Chambers, 12 Ill. 124; McKinney *v.* Peck, 28 Ill. 174.

When a proper plea denies the joint liability and the partnership, in an action on an apparently joint note, the partnership must be proved. King *v.* Haines, 23 Ill. 340.

A defence in *assumpsit*, good to one of several copartners, is good to all. Cooley *v.* Sears, 25 Ill. 613; Gribbin *v.* Thompson, 28 Ill. 61.

Under the law of Louisiana, so long as a commercial copartnership exists, the firm must be sued for a firm debt; individual partners can be charged only through the firm. Liverpool, &c., Nav. Co. *v.* Agar, 4 Woods (U. S.) 201; S. C. 14 Fed. Rep. 615.

Where a party defendant denies that he was a member of the firm sued, it is incumbent on the plaintiff to prove the fact. Atwater *v.* Colton, 18 La. Ann. 226.

If a note or bond be signed in the name of a partnership, any one of the partners may be sued alone. Griffin *v.* Samuel, 6 Mo. 50.

(*d*) See the note to Cabell *v.* Vaughan, 1 Wms. Saund. 291, *b*; Byers *v.* Dobey, 1 H. Bl. 236; Bonfield *v.* Smith, 12 Mees. & W. 405.

some of them are abroad.(*e*) This rule applies to actions against partners for the recovery of penalties imposed upon them by statute,(*f*) and to actions in form *ex delicto*, but founded in substance on a breach of contract, express or implied;(*g*) but it is subject to certain real or apparent exceptions which require notice.21

(*e*) See 3 and 4 Wm. IV., c. 42, § 8; Joll *v.* Lord Carson, 4 C. B. 249. See, before this statute, Sheppard *v.* Baillie, 6 T. R. 327.

(*f*) Bristow *v.* James, 7 T. R. 257.

(*g*) Powell *v.* Layton, 2 Bos. & P. N. R. 365; Buddle *v.* Willson, 6 T. R. 369.

21. **On contracts, generally.** — Ordinarily, a suit on a partnership debt must be brought against all the partners. Bowen *v.* Crow, 16 Neb. 556. But it is competent for a person having a cause of action against a firm, on a partnership contract, to sue one or more of the partners, at his election. Hicks *v.* Maness, 19 Ark. 701; Johnson *v.* Byrd, 1 Hempst. (U. S.) 434; Hamilton *v.* Buxton, 6 Ark. 24; Burgen *v.* Dwinal, 11 Ark. 314; Hicks *v.* Bronton, 21 Ark. 186; Kent *v.* Wells, Id. 411; Ryerson *v.* Hendrie, 22 Iowa 480; Williams *v.* Rogers, 14 Bush (Ky.) 777; Yates *v.* Watson, 54 Mo. 585. See, also, Green *v.* Pyne, 1 Ala. 235; McCullough *v.* Judd, 20 Ala. 703; and, in some of the states, judgment may be rendered against less than the whole number sued. White *v.* Tudor, 32 Tex. 758; Finney *v.* Allen, 7 Mo. 416; Williams *v.* Rogers, 14 Bush (Ky.) 777; Dean *v.* Savage, 28 Conn. 359; Miles *v.* Von Deyn, 6 N. W. Rep. 39.

In an action against partners on an account, the partnership must be proved. Trowbridge *v.* Sanger, 4 Ark. 179; Alfred *v.* Thompson, 5 Ark. 347; Teller *v.* Muir, 2 Penn. (N. J.) 749.

In an action against a partnership for goods sold, where the defence is that goods sold to an individual member of a firm were sold on his private account, it is error for the court to reject letters, offered in evidence by the defendant, which were written by the plaintiff to a third party, and were to the effect that the account was against the individual member of the firm. Adams *v.* Eatherly Hardware Co. (Ga.), 3 S. E. Rep. 430.

If one partner promises, individually, to pay a debt, he will not be allowed to show that it was due jointly from himself and copartners. Conley *v.* Good, Breese (Ill.) 96.

In a suit upon a copartnership note, either member of the firm, if the note is tainted with usury, may set up that fact in defence, without the consent of the other members; and one member who has purchased the interest of the others, assuming the partnership debts, and has renewed the note tainted with usury, by the execution of a new one in his own name, may set up this defence. But *aliter* as to a third party assuming payment of a note thus tainted. Machinists' Bank *v.* Krum, 15 Iowa 49.

If a partnership and an individual are joint makers of a note, when nothing appears to the contrary, the partnership is liable for one-half the amount of the note. Hosmer *v.* Burke, 26 Iowa 353.

Where the holder of a note signed with the firm names of two different firms, sues several individuals as members of said firms, and it appears on the trial that one of the defendants is not liable because not a member of either firm, and also that another of the de-

Actions against infant partners.—In the first place, an infant partner, not being bound by any *contract entered into by or on behalf of the firm, ought not to be joined as a defendant in an action on any such contract. (*h*)[22] [*281

fendants is not liable, because the person who signed the firm name of one of the firms had no authority to do so, nor any authority to bind this particular defendant, the plaintiff may dismiss his action against those two defendants who are not liable, and take judgment against those who are shown to be liable. Silvers *v.* Foster, 9 Kan. 56.

To a joint declaration against partners, a plea, by one, that they did not promise within five years, is a good plea. Vallandingham *v.* Duval, 7 J. J. Marsh. (Ky.) 262.

Where a firm holding a lease of premises with the privilege of renewal, dissolves partnership, and one of the former partners claims the right of renewal, the other partner need not be made a party to an action to remove him from such premises. Geheebe *v.* Stanley, 1 La. 17.

To support an action against two as acceptors of a draft in their partnership

(*h*) See 1 Wms. Saund. 207, *a*; Chandler *v.* Danks, 3 Esp. 76; Burgess *v.* Merrill, 4 Taunt. 468; Jaffrey *v.* Frebain, 5 Esp. 47. Formerly it was thought that an infant partner ought to be made a codefendant. See Ex parte Henderson, 4 Ves. 164; Gibbs *v.* Merrill, 3 Taunt. 307.

22. Actions against infant partners.—In Burgess *v.* Merrill, cited in the text, infancy was held to be a good replication to a plea of non-joinder of an infant partner as defendant; but that case has not been followed in America. In this country, where one of several defendants in *assumpsit* pleads infancy and gives it in evidence upon the trial, the jury may find a verdict for the infant defendant, and for the plaintiff against the other defendants, and judgment may be rendered thereon. Cutts *v.* Gordon, 13 Me. 474; Allen *v.* Butler, 9 Vt. 126; Barlow *v.* Wiley, 3 A. K. Marsh. (Ky.) 457; Cole *v.* Pennell, 2 Rand. (Va.) 149; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160; Tuttle *v.* Cooper, 10 Pick. (Mass.) 281; Wamsley *v.* Lindenberger, 2 Rand. (Va.) 179; Woodward *v.* Newhall, 1 Pick. (Mass.) 500. Thus, where in an action on a contract defendant pleads non-joinder of his copartner, a reply that such copartner is an infant is bad on demurrer. Slocum *v.* Hooker, 13 Barb. (N. Y.) 536. In such a case the plaintiff may enter a *nolle prosequi* against the infant, and proceed to judgment against the other defendants. See Woodward *v.* Newhall, 1 Pick. (Mass.) 500; Kirby *v.* Cannon, 9 Ind. 371; Ex parte Nelson, 1 Cow. (N. Y.) 417; Mason *v.* Dennison, 15 Wend. (N. Y.) 66.

Judgment was rendered in an action against a partnership, for a firm debt, in favor of two of the partners, on the ground of their infancy at the time the debt was contracted, and in favor of the plaintiff against the other partner. *Held*, that the firm assets could be applied towards the payment of the judgment against the adult partner. Whittemore *v.* Elliott, 7 Hun (N. Y.) 518. S. P., Gay *v.* Johnston, 32 N. H. 167.

Actions against dormant partners.—Secondly, as regards dormant partners. It has been seen that they are liable on all contracts entered into on behalf of the firm to which they belong, and whether

name, the plaintiff must prove the partnership, and that one, at least, of the defendants accepted the draft. Head *v.* Sleeper, 20 Me. 314.

If the *narr.* charges the partnership in the ordinary way, and the affidavit accompanying it alleges the sum sued for to be due from A and B, copartners, trading as A & Co., upon a note filed with the declaration, that is a sufficient allegation of partnership to require defendant to deny it in the manner provided by the statute. Thorne *v.* Fox (Md.), 8 Atl. Rep. 667.

An action will lie against one partner who makes a warranty on the sale of goods, on the warranty, without joining the other partner. Clarke *v.* Holmes, 3 Johns. (N. Y.) 148; Cookingham *v.* Lasher, 38 Barb. (N. Y.) 656.

Where, in an action against three defendants, sought to be charged as partners, only one appears and defends, and there is evidence of his liability, the objection cannot be maintained that there is not sufficient evidence of the liability of the other defendants; because, if they were not served with process, a judgment would not affect them, and if they were served with process, and failed to appear, their default is an admission of their liability. Van Eps *v.* Dillaye, 6 Barb. (N. Y.) 244.

Under the code, in an action against three as partners, judgment may go against the two who alone were served and appeared, upon proof that they alone composed the firm. Pruyn *v.* Black, 21 N. Y. 300.

Where separate judgments are rendered against the defendants in an action against a firm on a partnership obligation, instead of a joint judgment against all, the court cannot set aside the judgments on motion made more than one year after their rendition. Judd *v.* Hubbell, 76 N. Y. 543.

It is a good defence to an action, on a draft of a firm, that one of the defendants is, in fact, the owner of the draft, and that plaintiff has no title thereto. Stettheimer *v.* Stettheimer, 2 N. Y. St. Rep. 358.

Where three defendants, partners, have been served with process, and one has pleaded, judgment against him is erroneous, without first taking an interlocutory judgment against the other two. Nelson *v.* Lloyd, 9 Watts (Pa.) 22.

In a suit against several partners, some of whom have not appeared, if the plaintiff declare against all, he may, after verdict against those who have appeared, have judgment against those who have not. Taylor *v.* Henderson, 17 Serg. & R. (Pa.) 453.

Illustrations.—In an action upon the obligation of a firm, contracted while one of the members was a *feme sole*, but who had since married—*Held*, that her husband was properly joined as a party defendant. Keller *v.* Hicks, 22 Cal. 457.

If A, being a partner of B, executes certain notes, procures B to endorse them, and then delivers them to the firm to enable it to replace money which he owes it, and thereupon the firm offers the notes at a bank for discount, and the bank discounts them, and places the proceeds to the credit of the firm, it is a question for the jury whether or not a partnership liability is not thereby incurred, and it cannot be affirmed, as matter of law, that the liability is merely

such a contract is written or unwritten, express or implied, it is clear that a dormant partner may be sued upon it.(*i*) Dormant partners, moreover, ought to be made codefendants in an action on a contract binding the firm.(*k*) But a person who holds himself out to another as the only person with whom that other is dealing, cannot be allowed afterwards to say that such other was also dealing with somebody else.(*l*)[23]

individual. City Bank of New Haven's Appeal (Conn.), 7 Atl. Rep. 548.

A partner dealing in the name of his firm was inquired of by the party with whom he dealt, of what persons the firm consisted, and replied, of himself and another, whose names he gave in writing. In a suit against the two as partners, they pleaded that there was another partner not joined, and the promises alleged were made by the three jointly. Upon issue joined, the defendants were held to be estopped to prove the partnership to consist of three. Chase *v.* Deming, 42 N. H. 274.

In a suit against partners, plaintiff declaring especially on a note, with the common counts, failed to allege that defendants were partners. *Held*, that he could recover either on the note, or, under the common counts, on another note signed by the firm name by one only of the partners. Hawley *v.* Hurd, 56 Vt. 617.

In an action against a partnership of B., W. & Co, W. appeared and pleaded *non assumpsit*. Afterwards B., against whom the suit had been abated, entered his appearance, and without filing any plea, entered into the trial and defended the suit. It was held that a judgment against B. and W. only was not erroneous, as they did not discover, by a plea in abatement, that there were other partners, and as B., by appearing and going to trial without a separate plea, had bound himself to abide by the plea of his other partner. Barnet *v.* Watson, 1 Wash. (Va.) 372.

(*i*) Robinson *v.* Wilkinson, 3 Price 538; Beckham *v.* Drake, 9 Mees. & W. 79, and 11 Id. 315, overruling Beckham *v.* Knight, 4 Bing. N. C. 234, and see *ante* p. *178. Of course, if a person is sued on the ground that he is a dormant partner, that fact must be proved, for otherwise no case will be made against him. See Hall *v.* Bainbridge, 8 Dowl. 583.

(*k*) See Bonfield *v.* Smith, 12 Mees. & W. 405; Dubois *v.* Ludert, 5 Taunt. 609, where it was held that a dormant partner ought to be joined.

(*l*) See De Mautort *v.* Saunders, 1 B. & Ad. 398; Stansfeld *v.* Levy, 3 Stark. 8. Whether a defendant has so held himself out is a question for the jury. Compare the cases in the last note.

23. Actions against dormant partners.—Dormant and secret partners furnish exceptions to the rule that in actions on contract against partners all the ostensible and public members of the firm who belonged thereto at the time of the making of the contract sued on must be joined as defendants. Page *v.* Brant, 18 Ill. 37; Mitchell *v.* Dale, 2 Harr. & G. (Md.) 159; Jackson *v.* Alexander, 8 Tex. 109.

Thus, a dormant partner is an allowable, but not an essential party to a suit. Desha *v.* Holland, 12 Ala. 513; Mitchell *v.* Dale, 2 Harr. & G. (Md.) 159.

In an ordinary action against a com-

One partner liable if others are not disclosed.—If, therefore, a person carries on business in his own name, and incurs debts in so

mercial partnership, to recover a debt due for goods sold, a dormant partner who is not a privy to the contract need not be joined with the ostensible partners. Jackson *v.* Alexander, 8 Tex. 109.

In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners. Lord *v.* Baldwin, 6 Pick. (Mass.) 348.

Where a limited and dormant partnership is carried on by one partner in his individual name, and he borrows money, avowedly for the use of the partnership, the dormant partners will be liable without further proof that the money went to the use of the firm. Otherwise, if when he borrows, he makes such representation. Etheridge *v.* Binney, 9 Pick. (Mass.) 272.

A person who is held out as a partner, or as a dormant partner, may, although he has not signed the articles of partnership, be sued and held jointly with those who did sign them. Wood *v.* Cullen, 13 Minn. 394.

In *assumpsit* for goods sold and delivered, the plaintiff need not join a merely nominal partner of the purchaser as a defendant. Hatch *v.* Wood, 43 N. H. 633.

A bill against dormant partners, after judgment recovered against the ostensible partners, cannot be sustained without showing special cause for relief, as that the plaintiff was kept in ignorance of the partnership by undue means; that he has used due diligence to inform himself, &c. Penny *v.* Martin, 4 Johns. (N. Y.) Ch. 566.

Under the code, suits for debts of a limited partnership may be brought against the general partners only, and a levy in pursuance thereof on firm property binds the interests of all the partners. Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553.

The plaintiff in an action upon an agreement made by a firm need not join as defendant a dormant partner therein, whom he did not know to be a partner when the agreement was made, if there was nothing in the style of the firm indicating the existence of any other partner. Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28; Brown *v.* Birdsall, 29 Barb. (N. Y.) 549. See. also, Farwell *v.* Davis, 66 Barb. (N. Y.) 73.

In order to charge a dormant partner on a firm note, it must be shown either that the loan was on the credit of the firm, or that the money for which the note was given was used in the business or for the benefit of the firm. Fosdick *v.* Vanhorn, 40 Ohio St. 459.

The liability of a dormant partner may be avoided by proof of fraud in forming the partnership, if no part of the funds has been received by such dormant partner. Mason *v.* Connell, 1 Whart. (Pa.) 381.

A failure to name as a party defendant, in an action against a partnership, a dormant partner, is immaterial, as a judgment will bind such partner as fully as though made a party to the record. Tynberg *v.* Cohen (Tex.), 2 S. W. Rep. 734.

Although a partnership may be open and notorious in the immediate neighborhood of the place of business of the firm, yet, if its existence be not known to the plaintiff, and one member of the

doing, he may be properly sued alone for such debts. (*m*) The same holds whenever a partner enters into a written contract in which he does not disclose the fact that he is acting for other people, for although they may be sued, he cannot insist that they shall be sued. (*n*)

firm make the contract with the plaintiff in his own name, and credit be, upon reasonable grounds, given by the plaintiff to him alone, an action upon the contract may be sustained against him, without joining his copartners as defendants. Hagar *v.* Stone, 20 Vt. 106; Cleveland *v.* Woodward, 15 Vt. 302; Blin *v.* Pierce, 20 Vt. 25. See, also, Farwell *v.* Davis, 66 Barb. (N. Y.) 73.

Where a partnership exists between two persons, one of whom is a dormant partner, and the creditors of the firm have obtained judgments against the ostensible partner, founded on debts created on the partnership account, upon which executions have been issued and returned *nulla bona*, a bill in equity against both partners will be sustained, upon the allegation that the dormant partner has, by fraudulent connivance with the ostensible one, obtained the possession of and laid claim to all the partnership assets, in fraud of the creditors; the relief which equity will give is to subject the whole assets to the payment of such debts. How *v.* Kane, 2 Chand. (Wis.) 222.

Illustrations.—Where one or more of several defendants, sued as partners, answered, denying that they were members of the firm, or indebted to the plaintiff on the cause of action stated in the petition, and on the trial of this issue the jury returned a general verdict for the plaintiff, and also found specially, under the direction of the court, that the defendants so answering were not, in fact, members of the firm, but had held themselves out as partners, and that the plaintiff had dealt with and trusted them accordingly—*Held*, that such special finding was not inconsistent with the general verdict, and that judgment was properly entered thereon for the plaintiff. Reber *v.* Columbus, &c., Co., 12 Ohio St. 175.

Where a firm consisting of three members, B., A. and M., did business under the firm name of "B. & A.," and everything in the apparent mode of transacting their business indicated that B. and A. constituted the sole members of the firm; and there was nothing to signify to ordinary dealers with the firm that M. had anything to do with it; and there was an entire omission on the part of B. and A. to communicate the fact of such connection to one dealing with them; and actual ignorance by him of such connection, and apparent good faith on his part in treating B. and A. as the only parties interested, it was held that the referee was right in regarding M. as a dormant partner, and therefore not necessary to be joined as a codefendant with B. and A. North *v.* Bloss, 30 N. Y. 374.

(*m*) See, in addition to the cases cited in the last note, Mullett *v.* Hook, Moo. & M. 88; Baldney *v.* Ritchie, 1 Stark. 338; Doo *v.* Chippenden, Abbott on Shipping 84; Colson *v.* Selby, 1 Esp. 452. Dubois *v.* Ludert, 5 Taunt. 609, is the other way, but cannot, it is conceived, be supported.

(*n*) See Higgins *v.* Senior, 8 Mees. & W. 834, where the plaintiff knew the defendant was acting as agent.

Statutory exceptions to general rule.—Thirdly, to the general rule that all persons jointly liable on a contract ought to be sued jointly, there are a few statutory exceptions. Thus, by the Carriers' act, a person sued as a common carrier, and not on any special agreement,

*282] cannot *require his copartners to be joined;(*o*) and by the Companies' act, 1862, members of a registered company, who know that it has carried on business for more than six months with less than seven members, are severally liable for the debts of the company contracted after such six months, and cannot require the other members to be joined.(*p*)

Actions on joint and several contracts.—With respect to joint and several contracts, the rule now is that all persons liable on them may be sued jointly or separately, or in the alternative in one action.(*q*)[24]

(*o*) 11 Geo. IV., and 1 Wm. IV., c. 68, §§ 5, 6.

(*p*) 25 and 26 Vict. c. 89, § 48.

(*q*) Ord. XVI., rr. 1, 4, 6. See, as to the old law, the note to Cabell *v.* Vaughan, 1 Wms. Saund. 291, *g*; and as to staying one action, when the creditor has been satisfied in another, see Carne *v.* Legh, 6 Barn. & C. 124; Nesbitt *v.* Howe, 8 Ir. L. Rep. 273.

24. **Actions on joint and several contracts.**—The doctrine of courts of equity that partnership debts are joint and several does not obtain in courts of law. Exchange Bank *v.* Ford, 7 Colo. 314.

The mere fact that the defendants are partners in the practice of medicine, does not render them jointly liable for the expenditures of each other having no connection with their partnership business as physicians. Thompson *v.* Howard, 2 Ind. 245.

All partnership contracts are declared by statute to be joint and several; therefore, in a suit against one partner, counts on a firm debt for which he is severally liable, may be joined with counts on an individual debt, but if the creditor treat the contract as joint, by suing all the partners, he must prove a joint contract as alleged, and cannot amend by discontinuing as to part of the defendants and joining a count on a contract by one only, in order to meet the proof which is of such a contract. Miller *v.* Northern Bank, &c., 34 Miss. 412.

The liability of those composing the firm for a firm debt is joint and several, and judgment may be rendered against any one or more of the copartners without the joinder of others. Simpson *v.* Schulte, 21 Mo. App. 639.

On a firm note, in terms promising jointly and severally, the partner who signed the firm name may be sued alone. Snow *v.* Howard, 35 Barb. (N. Y.) 55.

In Devaynes *v.* Noble (1 Mer. 529, 563, 564) the Master of the Rolls said: "It may be proper, however, to observe that the common law, though it professes to adopt the *lex mercatoria*, has not adopted it throughout in what relates to partnership in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no surviv-

Actions on contracts not binding on firm.—The previous remarks have been addressed to the case of actions on contracts binding the firm. But a contract may be entered into by a partner and not bind the firm, either because it was not entered into on behalf of the firm, or because if it was, the partner entering into it exceeded his authority, express and implied. In such cases, the old rule was that the partner contracting, and no one else, ought to be sued. If he contracted as a principal, he ought to be sued on the contract; whilst if he contracted as an agent, he ought to be sued as having done so without authority. (*r*) If a partner entered into a contract on behalf of the firm, but exceeded his authority, and the contract did not bind the firm, and the firm repudiated it, the partner contracting, and not the firm, ought to have been sued for money paid to him under it, and sought to be recovered back. (*s*) But now in cases of this description, whenever there is any doubt as to who ought to be sued, the prudent course is to sue all the partners, and so to frame the statement of claim as to be able to obtain judgment against the right persons according to the evidence on the trial. (*t*)[25]

orship between them in point of interest. Yet, with regard to partnership contracts, it applies its own peculiar rule, and, because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors; whereas, I apprehend, by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why courts of equity have considered joint contracts of this sort (that is, joint in form) as standing on a different footing from others. The cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them. But how is it possible to explain the cases upon partnership notes, so as to distinguish them from ordinary partnership debts?"

(*r*) See Lewis *v.* Nicholson, 18 Q. B. 503.

(*s*) See Hudson *v.* Robinson, 4 Man. & S. 475.

(*t*) See Ord. XVI., r. 1. Honduras Rail. Co. *v.* Tucker, 2 Ex. D. 301.

25. Actions on contracts not binding on firm.—In a suit against partners, if one of them shows that the name of the firm was put to the note without his authority, and that the debt was not a firm debt, and he is discharged by the jury, judgments may be entered for him and against his partner. And in such a case the holder of the note may bring a several suit against the partner liable and recover a several judgment. Parker *v.* Jackson, 16 Barb. (N. Y.) 33.

Actions of tort against partners.—It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly;(*u*) but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants,(*x*) and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself.(*y*) But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land, for all joint tenants, or tenants in common, ought to be joined in an action for an injury arising from the state of their land;(*z*) and this rule applies to partners as well as to persons who are not partners.[26]

(*u*) See 2 Wms. Saund. 117, *b* and *c*; 1 Chitty on Plead. 96, 97.

(*x*) Sutton *v.* Clarke, 6 Taunt. 29.

(*y*) Mitchell *v.* Tarbutt, 5 T. R. 649; Ansell *v.* Waterhouse, 6 Mau. & S. 385.

(*z*) 1 Wms. Saund. 298, *f* and *g*, and Mitchell *v.* Tarbutt, 5 T. R. 649.

26. Actions of tort against partners generally.—An attachment may be sued out against one of several partners, without joining the others. Green *v.* Pyne, 1 Ala. 235.

When persons occupying relations to others as partners have obtained undue advantage of the latter by means of false representations and unlawful acts, they are answerable *in solido* for whatever loss has been incurred thereby, irrespective of their obligations as partners. Baldy *v.* Brackenridge (La.), 2 So. Rep. 410.

A firm is liable for an injury caused by the negligence of one of the partners, or an employee of the firm, while transacting its legitimate business. Linton *v.* Hurley, 14 Gray (Mass.) 191.

Creditors of a firm sued those whom they supposed to be the partners, and attached the firm property, after its conveyance, by bill of sale in the firm name, to third persons, claiming that the conveyance was fraudulent; and, in replevin brought by the transferees against the attaching officer, the plaintiffs sought to show by the partnership articles that one of the attachment defendants was not a partner in the firm, but that his mother was the partner. *Held*, that it was open to the defendant to show that the son was the real partner, and was held out as such, although he signed the partnership articles in the name of his mother. Bishop *v.* Austin (Mich.), 33 N. W. Rep. 525.

An action on the case for negligence occasioning the loss or destruction of a slave hired by plaintiff to a copartnership may be maintained against one of the members of the firm, without joining the other partners. So, if the negligence be that of an agent of the copartnership. White *v.* Smith, 12 Rich. (S. C.) 595.

B. *Actions in respect of equitable rights.*

Parties to actions in the Chancery Division.—Actions by and against partnerships for the specific performance or the rescission of contracts, for taking agency accounts, as well as in respect of frauds, breaches of trust, and other matters, are by no means unusual; and an action by a creditor of a firm to obtain payment out of the estate of a deceased partner, is a matter of almost daily occurrence. (*a*) [27]

As a general rule, an action in the Chancery Division by or against an ordinary partnership will be defective for want of parties, unless all the partners are before the court. But it was early held that where some partners are abroad, a suit against those who remain may be prosecuted with effect, and a decree be obtained against them for payment of the whole of the amount due from the firm. (*b*)

All the members of a firm ought to be parties to an action *for
*284] a general account; (*c*) and in an action for payment of a partnership debt out of the assets of a deceased partner the surviving partners ought to be parties. (*d*) But if the ground of action is fraud, it is not necessary to join a partner not implicated in it and not sought to be made liable. (*e*)

Actions against agents.—An agent of the firm may be sued for

(*a*) See, on this subject, book IV., ch. 3.

27. **Actions in respect of equitable rights.**—Except in case of the death of a copartner, creditors of a partnership can enforce their claims, which are purely legal, against the property of the partnership, only at law. Parish *v.* Lewis, 1 Freem. (Miss.) Ch. 299.

One who was a partner when a mortgage was given to the firm (but in the name of one partner only), and also when advances were afterwards made thereon by the firm, and when the bill was filed, ought to be a party to a suit to foreclose. De Greiff *v.* Wilson, 3 Stew. (N. J.) 435.

A person who has covenanted with the survivors of a partnership to stand in the place of a deceased partner and to satisfy his demands upon the firm, cannot, in a suit to settle the partnership affairs, object that the representatives of the deceased should have been parties. Waugh *v.* Mitchell, 1 Dev. & B. (N. C.) Eq. 510.

(*b*) See Darwent *v.* Walton, 2 Atk 510; Cowslad *v.* Cely, Prec. in Ch. 83 and see Orr *v.* Chase, 1 Mer. 729.

(*c*) Coppard *v.* Allen, 2 De G., J & S. 173.

(*d*) Ex parte Hodgson, 31 Ch. D. 177; Hills *v.* M'Rae, 9 Hare 297. See, also, *infra*, book IV., ch. 3, § 2.

(*e*) See Plumer *v.* Gregory, 18 Eq. 621; Atkinson *v.* Mackreth, 2 Eq. 570.

an account by all the partners, although he only knew of one of them, and was employed by and has transacted business with that one alone.(*f*) At the same time, an agent is only liable to account to his principal; and therefore, if a person has been employed by one partner only as principal, or has been induced by that partner to believe that he alone was the principal, in such a case the other partners have no right to call the person so employed to account with them.(*g*) On the other hand, if a person has throughout dealt with some partners only, and has all along treated them as principals, he can be compelled by them to account, and he cannot successfully insist that the other partners ought to be parties to the action.(*h*)

Actions by surviving partner.—A surviving partner may sue an agent of the firm for an account without making the executors of the deceased partner parties,(*i*) for the surviving partners are the proper persons to get in and give receipts for debts owing to the firm.(*k*)

3. *Actions by and against partners where a change in the firm has occurred.*

Effect of change in firm on actions by and against it.—In the preceding remarks upon the persons who ought to sue and be sued when a right is sought to be enforced by or against a firm, it has been assumed that no change in the members of the firm has occurred between the period when the right in *question [*285 accrued and the time when the action to enforce it is brought. It is proposed now to consider to what extent the rules above established require modification, when some such change has taken place by reason either of the introduction of a new partner, or of the retirement, death or bankruptcy of an old one.[28]

(*f*) See Killock *v.* Greg, 4 Russ. 285; Anon., Godb. 90.

(*g*) See Killock *v.* Greg, 4 Russ. 285; Maxwell *v.* Greig, 1 Coop. Cas. in Ch. 491.

(*h*) Benson *v.* Hadfield, 4 Hare 32; and see Aspinall *v.* The London and N. W. Rail. Co., 11 Hare 325.

(*i*) Haig *v.* Gray, 3 De G. & S. 741.

(*k*) See Philips *v.* Philips, 3 Hare 281; Brasier *v.* Hudson, 9 Sim. 1.

28. Effect of change in firm on actions by and against it.—Where one partner sells his share in the partnership stock to a stranger, and receives payment therefor, and the purchaser becomes a partner in the concern, such

First, with respect to changes caused by the introduction of new partners and the retirement of old ones.

Alterations made by Judicature acts.—By section 25, clause 6, of the Judicature act, 1873, debts may now be assigned by writing and notice to the debtor so as to entitle the assignee to sue for them in his own name. Consequently, if on the introduction of a new partner, or the retirement of an old partner, the debts due to the old firm are thus assigned to the new firm, the new firm can sue in respect of them, either in its mercantile name or in the names of its members. Again, a new partner may, it is apprehended, always be joined in an action to recover a debt or enforce a demand in which he has an interest, provided his joinder does not prejudice the rights of the defendants. Further, if an incoming partner has agreed with his copartners to take upon himself the debts and liabilities of the old firm, they can require him to be made a defendant for their own partial indemnity. (*l*)

When new partner can be sued.—Except, however, in these cases

purchase and payment will not have the effect to relieve the share of the stock of the remaining partner from liability for the debts of the old firm. Nixdorf *v.* Smith, 16 Pet. (U. S.) 132.

In a suit by two, as late partners, it is admissible for the defendant, on the general issue, to prove that no partnership existed at the time of the contract. Starke *v.* Kenan, 11 Ala. 818.

In an action by several alleging themselves to be copartners, the general issue pleaded does not admit that the plaintiffs were the persons composing that partnership when the contract declared on was made; but it is an admission of the existence of a copartnership of that name. Norcross *v.* Clark, 15 Me. 80.

A dissolution of a partnership by the death of one of the partners, or otherwise, and an adjustment of the partnership concerns, will not be such a severance of a joint demand in favor of the partnership as will entitle either partner or his executor or administrator to sue alone for his share, without the consent of the debtor to such severance; but all the partners, if living, must join in the action; and if any of them be dead, the action must be brought by the survivor or survivors. Peters *v.* Davis, 7 Mass. 257; Austin *v.* Walsh, 2 Id. 405.

Where a creditor of a firm which is dissolved takes in payment a note of the successors of the firm, not knowing of the dissolution, and believing the note to be that of the firm, he may sue on the original claim without proving that he was fraudulently induced to take the note. Buxton *v.* Edwards, 134 Mass. 567.

Two partners who make a special contract to do work for a third person must join as plaintiffs in a suit on the contract, even though the firm be dissolved before the completion of the work. Fish *v.* Gates, 133 Mass. 441.

(*l*) Ord. XVI., rr. 48, *et seq.*

an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement, express or implied, between himself and the person suing him or being sued by him.(*m*)

As regards negotiable instruments, indeed, any persons who can agree to sue jointly upon them may do so, provided the instrument is in such a state as to pass by delivery; therefore, if a bill or note, endorsed in blank, is given to a firm consisting of certain individuals, who afterwards take in a new partner, they and he, or some or one of them, may sue on that bill or note.(*n*)[29]

(*m*) See, accordingly, Wilsford *v.* Wood, 1 Esp. 182; Ord *v.* Portal, 3 Camp. 239, note; Waters *v.* Paynter, Chitty on Bills 406 (10th ed.), note 5; Vere *v.* Ashby, 10 Barn. & C. 288; Young *v.* Hunter, 4 Taunt. 582. See Radenhurst *v.* Bates, 3 Bing. 463. See *ante* book II., ch. 2, § 3.

(*n*) See Ord *v.* Portal, 3 Camp. 239, and *ante* p. *274.

29. When new partner may be sued. —The dissolution of a firm by agreement between the members thereof will not affect the rights of its creditors, though the terms of such dissolution will frequently be enforced by the courts, as between the parties to such agreement. Hudgins *v.* Lane, 11 Bankr. Reg. 462.

An incoming partner will not be liable for an old debt of the firm, unless there is a novation of the debt, by a new promise, by the entire new firm, upon a valid consideration, and a discharge of the old firm upon the old debt. Stenburg *v.* Callanan, 14 Iowa 251.

Where an attorney holds moneys of a dissolved firm composed of three partners, he is chargeable in trustee process, in an action against a new firm composed of two members of the old firm and a third person, unless some hostile claim be made by the creditors of the old firm. Burnell *v.* Weld, 59 Me. 423.

As to the incoming partner's rights, and his liability to be sued on a firm debt existing at the time of his coming into the firm, see Mores *v.* Soc. for Destitute Children, 19 N. Y. Week. Dig. 247.

Illustrations.—Plaintiff sold goods to C. & D., who subsequently sold the same goods to C., D. & E. *Held*, that they could recover against C. & D., who could not change the first contract by their own act so as to charge the third partner. Atwood *v.* Lockhart, 4 McLean (U. S.) 350.

In 1843 A, B and C were partners, doing business under the firm of A, B & Co. In 1844 A and C formed a partnership under the firm of A & C. The latter firm were sued, as the firm of A & C, for a debt contracted by the former firm. *Held*, that A and C were liable only in a suit against the former firm. Fagely *v.* Bellas, 17 Pa. St. 67.

To an attachment suit against two partners for a firm debt, one of them pleaded in abatement. Subsequently the partnership was dissolved, after which the other partner interposed a general denial. *Held*, that both defendants were in court, notwithstanding the plea in abatement. Sanger *v.* Overmier, 64 Tex. 57.

*286] **Effect of retirement of old partner.*—So, as regards changes occasioned by the retirement of a partner. It has been already shown that the retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions. Subject, therefore, to the above observations, a retired partner ought to join as a plaintiff, and be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party. This rule holds good even where a contract is entered into before, and the breach of it occurs after the retirement of a partner. (*o*) In one case, indeed, it was held at *Nisi Prius* that where two partners sold goods, and they afterwards dissolved partnership, an action for the price of those goods was sustainable by the one partner who continued to carry on the business of the late firm; (*p*) but the propriety of this decision is more than questionable. Whether, however, it is now necessary to join as a plaintiff a retired partner against whom the defendant has no claim, and who has no beneficial interest in what is sought to be recovered, admits of some doubt.

Sometimes one partner retires and a new partner comes in, and an agent of the firm, in ignorance of the change which has occurred, enters into a contract on behalf of the firm; in such a case the members of the new firm may sue on the contract, unless the defendant is prejudiced by their so doing. (*q*) The liability of the retired partner on such a contract will, however, cease if the creditor sues the new firm and recovers judgment against it. (*r*)[30]

Fresh contract.—And a new firm may sue or be sued in respect

(*o*) See Dobbin *v.* Foster, 1 Car. & K. 323.

(*p*) Atkinson *v.* Laing, Dowl. & R. N. P. Cas. 16.

(*q*) Mitchell *v.* Lapage, Holt N. P. Cas. 253. But see Boulton *v.* Jones, 2 Hurlst. & N. 564.

(*r*) See Scarfe *v.* Jardine, 7 App. Cas. 345, noticed *ante* pp. *46 and *197.

30. Effect of retirement of old partner.—A parol agreement to release one partner does not operate to discharge a debt as against the other. Evans *v.* Carey, 29 Ala. 99.

Three persons being sued as partners, proof that after part of the account sued upon was created, and the partnership dissolved, the retiring partner paid the others a sum of money to cover his responsibility for the firm debts, is irrelevant and inadmissible. Gooden *v.* Morrow, 8 Ala. 486.

of a fresh contract entered into by or with it to pay a debt owing to or by an old firm. Thus, where A was indebted to B, and afterwards C entered into partnership with B, and A contracted a further debt with both, and then settled an account with both, as well upon what was due to B before his partnership with C, as upon the debt contracted afterwards, it was held that B and *C might join in an action of *assumpsit* on an account stated, and recover the whole debt. (*s*) [31] [*287

Change in firm may prevent it from suing.—Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already mentioned, confer upon the partners any new right of action against strangers, or *vice versa*, as regards what may have occurred before the change took place; it may, nevertheless, operate so as to discharge a person from a contract previously entered into by him. Thus, as was pointed out in the sixth chapter of the first book, (*t*) a person who is surety to a firm is discharged from his suretyship, for the future, by a change amongst its members, and cannot, therefore, be sued

(*s*) Moor *v.* Hill, Peake Add. Cas. 10.

31. Fresh contracts.—After the sale of his interest by one partner to the other, subsequent contracts for goods bind the purchasing partner only; at least, such is the rule in equity, though the retiring partner may be liable at law. McCarthy *v.* Fitts, 20 N. Y. Week. Dig. 225.

Where one member of a dissolved firm sues a purchaser, from the other, of partnership property, denying such other partner's right to convey the entire interest of the firm, and suing for the value of his (the plaintiff's) interest, the partner making the sale is not a necessary party. Hagendobler *v.* Lyon, 12 Kan. 276.

A mortgage was executed by P., in 1857, for $8000, on real estate, in favor of L. & C, commission merchants, for the purpose of securing and covering advances made and to be made by said commercial house, for the benefit of the plantation of P. After the execution of the mortgage, the commercial house of L. & C. was changed by the addition of new parties, and styled L., C. & Co. In 1862, P. executed three promissory notes in favor of the new firm of L., C. & Co. The holder of the notes brought suit to recover the amount, and claimed the benefit of the mortgage in favor of the old firm, executed in 1857. *Held*, that the addition of another party in the firm dissolved the old firm, in whose favor the mortgage was executed, and created a new firm, in whose favor the notes were given, and the new firm could not avail themselves of the mortgage given in favor of the old firm. Abat *v.* Penny, 19 La. Ann. 289.

(*t*) *Ante* p. *117.

either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change. Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by Robson *v.* Drummond. (*u*) In that case A and B were partners as coachmakers. C, who knew nothing of B, entered into a contract with A for the hire of a carriage for five years, at so much a year, and A undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A and B dissolved partnership, and A assigned the carriage and the benefit of the contract relating to it to B. B gave C notice of the dissolution and arrangement respecting the carriage, but C declined to continue the contract with B, and returned the carriage. An action was then brought by A and B against C for not performing the contract; but it was held that the action would not lie, the contract having been with A alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his *part. In Stevens *v.* Benning (*x*) the same principle was applied to a contract between an author and a firm of publishers, and it was held that the contract was one of a personal character, and that consequently the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.[32]

*288]

(*u*) 2 B. & Ad. 303. Compare British Wagon Co. *v.* Lea, 5 Q. B. D. 149.

(*x*) 1 Kay & J. 168 and 6 De G., M. & G. 223. See, also, Hole *v.* Bradbury, 12 Ch. D. 886.

32. **Change in firm may prevent it from suing.**—In Weston *v.* Barton (4 Taunt. 673, 682) Sir James Mansfield, in delivering the opinion of the court, said: "It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction. It is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not

Effect of death.—Secondly, with respect to changes caused by death. Before the Judicature acts, when a partner died in the lifetime of any one or more of his copartners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death must have been brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of any such contract. (*y*) So, an action for the

some persons possessing these qualities in a greater degree than the rest, and it may be that the partner dying, or going out, may be the very person on whom the sureties relied. It would, therefore, be very unreasonable to hold the surety to his contract after such change; and though the sum here is limited, that circumstance does not alter the case, for although the amount of the indemnity is not indefinite, yet £3000 is a large sum; and even if it were only £1000, the same ground in a degree holds, for there may be a great deal of difference in the measure of caution or discretion with which different persons would advance even £1000. Some would permit one who was almost a beggar to extend his credit to that sum; others would exercise a due degree of caution for the safety of the surety. And therefore we are of opinion that as to such sums only which were advanced before the decease of Golding, can an indemnity be recovered by the plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant."

In Strange *v.* Lee (3 East 484, 490) Lord Ellenborough said: "The court will no doubt construe the words of the obligation according to the intent of the parties to be collected from them, but the question is what that intent was. The defendant's obligation is to pay all sums due to them on account of their advances to Blyth. Now, who are 'them' but the persons before named, amongst whom is James Walwyn, who then constituted the banking-house, and with whom the defendant contracted. The words will admit of no other meaning. And, indeed, with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters, therefore, of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement."

(*y*) Dixon *v.* Hammond, 2 B. & A. 310, which shows that an agent of the firm must account to the surviving partners. See, too, Martin *v.* Cromps, 1 Ld. Raym. 340, and 2 Salk. 444; and Webber *v.* Tyvill, 2 Wms. Saund. 121, *e.* Formerly, this was otherwise—see the authorities collected in Buckley *v.* Barber, 6 Ex. 178.

conversion of partnership goods must have been brought by the surviving partners. (z) 33

Actions by and against surviving partners.—It followed from the

(z) Kemp *v.* Andrews, Carth. 170; but see Buckley *v.* Barber, 6 Ex. 164. An indictment for stealing them may be preferred by the surviving partners and the next of kin of the deceased partner. R. *v.* Gaby, Russ. & R. 178; R. *v.* Scott, Id. 13.

33. **Effect of death.**—In equity, partnership debts are considered joint and several, and the joint creditors have the right to proceed against the estate of a deceased partner, if the surviving partners are insolvent and there is no joint fund to which they may resort. Emanuel *v.* Bird, 19 Ala. 596.

A court of equity had original jurisdiction to enforce the payment of a partnership debt out of the estate of a deceased partner, and that jurisdiction is not taken away by any provision of the code. Waldron *v.* Simmons, 28 Ala. 629.

A debt against a partnership is several as well as joint, and the separate estate of a deceased partner is liable for a partnership debt. M'Lain *v.* Carson, 4 Ark. 164.

A surviving copartner can alone be sued for a partnership debt, and the representatives of the deceased partner cannot. Roosvelt *v.* McDowell, 1 Ga. 489.

While, pending a suit by a third person, against partners for an account, one of them dies, his personal representatives must be made parties, in the absence of evidence that there are no firm assets sufficient to pay the debts of the firm. Pearce *v.* Bruce, 38 Ga. 444.

If two partners be indebted for goods sold and delivered, and one die in the lifetime of the other, the administrator of the deceased partner may be sued at law for the debt. Ramsom *v.* Pomeroy, 5 Blackf. (Ind.) 383.

When suit is brought on a note in the names of three members of a dissolved firm, and is excepted to on the ground that one is dead, plaintiffs may amend by striking out his name, on proof that his interest had been fully transferred to one of the others. Miller *v.* Cappel (La.), 2 So. Rep. 807.

No joint action can be maintained against the several administrators of deceased partners, for the debt is severed by the death of either, and the remedy must be against their estates severally. McNally *v.* Kerswell, 37 Me. 550.

Under Mass. Gen. Stat., c. 97, § 28, a suit on a partnership debt may be maintained and a verdict rendered against the executor of a deceased partner, notwithstanding the insolvency of such partner's estate. Sampson *v.* Shaw, 101 Mass. 135.

To bind a defendant as an heir holding a partnership interest in trust, it is not sufficient to challenge in a general way the partnership character of the interest. Jenness *v.* Smith, 58 Mich. 280.

The looking to a surviving partner for payment, and the acceptance of interest from him by a creditor of the firm, raises no presumption of an agreement to release the estate of the deceased partner from its secondary liability. Fogarty *v.* Cullen, 49 N. Y. Super. Ct. 397; Hamersley *v.* Lambert, 2 Johns. (N. Y.) Ch. 508.

To a bill against a partnership after the death of a part of the members, the representatives of such as have deceased ought to be parties. Carter *v.* Currie, 5 Call (Va.) 158.

above rule that the last surviving partner, or, if he was dead, his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm. (*a*)

These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is joint in equity as well as at law. Wherever it is several as well as joint, (*b*) an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner. (*c*) [34]

(*a*) Richards *v.* Heather, 1 B. & A. 29; Calder *v.* Rutherford, 3 Brod. & B. 302.

(*b*) As to which, see *ante* p. *194.

(*c*) Ord. XVI., rr. 1, 4, 6, 8.

34. **Actions by and against surviving partners—rights of surviving partner generally.**—The sole surviving partner is, in law, the owner of all the partnership effects; and the partnership funds in the hands of garnishees may be ordered to be paid over to separate creditors of the surviving partner, on their giving bond and security to answer any claim which may afterwards be made on the funds. Knox *v.* Schepler, 2 Hill (S. C.) 595.

Payment, to an executor or administrator of a deceased partner, of a partnership claim, is no defence to an action by the survivor. Wallace *v.* Fitzsimmons, 1 Dall. (U. S.) 248; Rice *v.* Richards, 1 Busb. (N. C.) Eq. 277.

When the surviving partner may sue alone.—A surviving partner is the sole representative of the partnership property, and the representatives of the deceased partner need not be made parties to a proceeding at law or in equity affecting such property. Robinson *v.* Thompson, 1 Smed. & M. (Miss.) Ch. 454.

Upon the death of a partner, the right of action on a partnership claim survives to the survivor. Davis *v.* Church, 1 Watts & S. (Pa.) 240; Bernard *v* Wilcox, 2 Johns. (N. Y.) Cas. 374; Walker *v.* Galbrath, 3 Head (Tenn.) 315.

The surviving partners are the proper parties in actions upon firm claims; the executor of a deceased partner should not be allowed to intervene without some sufficient reason. Watson *v.* Miller, 55 Tex. 289.

Where the surviving partner files a bill in equity, it is not necessary to make the representatives of the deceased partner parties. They have no claim until the partnership debts are paid, and even then their claim is upon the surviving partner or his representatives. Pagan *v.* Sparks, 2 Wash. (U. S.) 325.

If a partnership, upon its dissolution, convey all its effects to one of the firm, and, after such dissolution and transfer, a debtor of the firm promise to pay the individual partner, he may maintain an action in his own name on the promise. Howell *v.* Reynolds, 12 Ala. 128.

Where a partner dies, the survivor may carry on suits for recovering partnership debts, without joining the personal representative of the deceased partner; and where the survivor, during the progress of a suit, becomes bankrupt, he may still carry on the suit in his own name, particularly where he had conveyed, during his lifetime, all his

Effect of bankruptcy.—Lastly, with respect to changes caused by bankruptcy. *Formerly, if a partner was bankrupt, his assignees were required to join in his stead in any action in [*289

interest in the demand in action to the deceased partner, for in such case no interest in the demand passed to his assignee. McCandless *v.* Hadden, 9 B. Mon. (Ky.) 186.

The liquidating partner of a commercial firm may sue in his own name, by representing the claim sued on as arising out of the business of the late firm, so as not to deprive the defendant of any means of defence to which he would be entitled in a suit in the name of all the partners. White *v.* Jones, 14 La. Ann. 681.

Where a debt was originally due to two partners, and one has deceased, and the debtor has done nothing to change his original liability, the action on the debt must be brought in the name of the surviving partner, although, by an agreement between the parties, the beneficial interest was in the deceased. Clark *v.* Howe, 23 Me. 560.

An action at law may be maintained in the name of two surviving partners for the benefit of one of them, on an account assigned from the partnership during the lifetime of all the partners to such one. The provisions of Rev. Stat., ch. 69, relating to the settlement of the estate of deceased partners, have no application to such case. Matherson *v.* Wilkinson (Me.), 8 Atl. Rep. 684.

After the death of one partner, a suit upon a bond to the partnership, brought by the survivor, joining the name of the deceased as if he were still alive, cannot be supported, and the erroneous joinder cured by proof, that at the time of suit brought, another person, of the same name with the deceased partner, was living; for this does not prove identity. Teller *v.* Wetherell, 9 Mich. 464.

Where a debtor of a copartnership stated an account between them admitting a balance due from himself for goods sold in the lifetime of the deceased partner—*Held*, that the survivors might recover such balance on an *insimul computassent*, without stating the death of the other partner and the survivorship; the stating of an account being in the nature of a new promise to the survivors. Holmes *v.* De Camp, 1 Johns. (N. Y.) 34.

A surviving dormant partner may sue alone upon a debt due the partnership. Beach *v.* Hayward, 10 Ohio 455.

A surviving partner, suing to recover a partnership claim, may join his individual claim in the same action. Davis *v.* Church, 1 Watts & S. (Pa.) 240.

When the representative of the deceased partner may be joined as co-plaintiff.—If land is purchased by partners with partnership funds, for partnership purposes, and is not needed for the payment of debts, the title vests in the members of the firm as tenants in common; and, after the death of one of them, a petition for damages sustained by reason of the location of a railroad upon it, is properly brought in the joint names of his administrator and the surviving partner. Whitman *v.* Boston, &c., Railroad, 3 Allen (Mass.) 133.

The death of a partner, co-plaintiff in the court below and co-appellant in the Supreme Court, being suggested, the case may proceed to final judgment in the name of the surviving partner; if, however, either the surviving partner or the appellee moves for a *sci. fa.* to

which, had no bankruptcy intervened, the bankrupt himself would have been necessarily joined as a plaintiff.(*d*) If the assignees de-

make the representative of the decedent's estate a party, it will be awarded. Gunter *v.* Jarvis, 25 Tex. 581.

When surviving partner should be sued alone.—Where the surviving partner of a firm which is insolvent assigns certain real estate of the firm for the benefit of its creditors, the heirs of the deceased partner are not proper parties to a suit involving title to such real estate, there being no relation of trust or confidence between them and the assignee. Rothwell *v.* Dewees, 2 Black (U. S.) 613.

A creditor of a firm may maintain a suit against a surviving partner without making the representatives of a deceased partner parties. Southard *v.* Lewis, 4 Dana (Ky.) 148.

All partnership property and responsibilities on the death of one partner survive to his copartners, and it is not necessary to make his personal representative a party to a bill, in relation to such matters, against the firm. Jones *v.* Hardesty, 10 Gill & J. (Md.) 404.

Where it is sought to subject firm assets in the hands of the surviving partner, the representative of the deceased partner is not a necessary party, if the object is merely to reach the property of the firm. Otherwise if the suit be brought to subject the individual property of the partners. Robertshaw *v.* Hanway, 52 Miss. 713.

The joinder of the surviving partners and the administrator of a deceased partner as defendants in an action brought on a firm obligation is error. Childs *v.* Hyde, 10 Iowa 294; Black *v.* Struthers, 11 Id. 459.

A joint action cannot be brought at law on a partnership note against the administrator of a deceased member thereof and the survivors. Maples *v.* Geller, 1 Nev. 233.

The representative of a partner cannot be sued while there is a surviving partner. Burgwin *v.* Hastler, 1 Tayl. (N. C.) 124.

When representative of deceased partner may be joined as defendant — Since the abolition of the distinctions between suits at law and in equity, by the South Carolina Code, the surviving partner and the representative of the deceased partner may be joined in one action. Wiesenfeld *v.* Byrd, 17 So. Car. 106.

Creditors may obtain judgment against the survivor and the representative of the deceased partner jointly; or, at their election, against either separately, and proceed to enforce satisfaction against either. Of this neither the representative of the deceased partner nor the survivor can complain, but they have their remedy over against each other. Saunders *v.* Wilder, 2 Head (Tenn.) 577.

When representative of deceased partner may be sued alone.—The creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance in equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law in the first instance. Story on Partn., § 362, n. 3. Nelson *v.* Hill, 5 How. (N. Y.) 127.

(*d*) Eckhardt *v.* Wilson, 8 T. R. 140; Thomason *v.* Frere, 10 East 418; Graham *v.* Robertson, 2 T. R. 282.

clined to join, the solvent partners were entitled to make use of their names upon indemnifying them against the costs of the

Where a surviving partner is insolvent, it is not necessary to obtain a judgment against him before proceeding against the equitable assets of a deceased partner's estate. Vance *v.* Cowing, 13 Ind. 460.

Judgments for firm debts may be recovered either against the surviving partner alone, or against the personal representatives of those deceased. Postlewait *v.* Howes, 3 Iowa 365.

Where a suit is brought by a surviving partner, as such, if he fails, the estate of the deceased partner is liable to contribute to the costs. Allen *v.* Blanchard, 9 Cow. (N. Y.) 631.

A partnership debt is recoverable against the executors of a deceased partner, even pending a suit against the survivors. Creswell *v.* Blank, 3 Grant (Pa.) Cas. 320. See Moore's Appeal, 34 Pa. St. 411.

Equity will not lend its aid to reach assets in the hands of executors when a complete, adequate and effectual remedy exists at law against surviving solvent partners. Van Reimsdyk *v.* Kane, 1 Gall. (U. S.) 371, 630.

A bill to charge the executors of a deceased partner with a partnership debt, where the other partner survives, must expressly charge an insolvency of the survivor. West *v.* Randall, 2 Mason (U. S.) 181.

In Wilkinson *v.* Henderson (1 Myl. & K. 582, 588) Sir John Leach, Master of the Rolls, said: "All the authorities establish that in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle that the joint estate is the first fund for the payment of the joint debts, and that the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner until it is established that full satisfaction cannot be obtained from the surviving partner, or, whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner, that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that according to the two decisions in Sleech's Case, in the cause of Devaynes *v.* Noble, the creditor was permitted to charge the separate estate of the deceased partner, which, in equity, was not primarily

action.(e) If all the partners were bankrupt, any action which it would have been necessary to bring in the names of all the partners,

liable, as between the partners, without first having resort to dividends, which might be obtained by proof under the commission against the surviving partner—I am of opinion that the plaintiff is entitled, in this case, to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner."

Objections for misjoinder—how made or waived.—At the common law the surviving partner alone has the right to sue for and recover debts due and owing the firm; an administrator cannot join. But it is too late to take objection to such misjoinder in a suit upon a judgment rendered in an action in which the misjoinder occurred. Belton *v.* Fisher, 44 Ill. 33.

The joinder of a cause of action against a surviving partner, with one against the administrator of the deceased partner for the same debt, must be objected to by demurrer; the objection is waived by an answer. Wright *v.* Storrs, 6 Bosw. (N. Y.) 600.

Rules of pleading in actions by surviving partners.—A defective or indistinct allegation of the surviving partner's right to sue in his own name may sometimes be supplied by the proofs. Milne *v.* Douglass, 17 Fed. Rep. 482.

In an action by a surviving partner to recover a debt due the partnership, it is sufficient, after verdict, that he sets out the character in which he sues at the commencement of the declaration. Hill *v.* M'Neil, 6 Port. (Ala.) 29.

In an action by a surviving partner on a note made to him in the firm name after the death of his copartner, the plaintiff need not negative payment to the deceased partner. Bonne *v.* Kay, 5 Ark. 19.

Where the plaintiff declares, as surviving partner of E. Y. B., on a note payable to "E. Y. B. & Co.," he must directly aver the identity of the payees with the plaintiff and his deceased partner, and cannot recover without such averment. Keith *v.* Pratt, 5 Ark. 661.

The survivor of several persons having a joint interest may sue in an action on simple contract without describing himself as survivor. In such case, however, the cause of action must be correctly set forth, that the defendant may know what he is called to answer. Vandenheuvil *v.* Storrs, 3 Conn. 203.

A complaint by surviving partners of a firm is bad, if it fail to state who constituted the firm, and how plaintiffs became survivors. Hubbell *v.* Skiles, 16 Ind. 138. But see Ledden *v.* Colby, 14 N. H. 33.

In an action by a surviving partner, as such, to recover money paid for the defendant after the death of the other partner, the plaintiff must prove that the money was paid in behalf of the partnership. Stevens *v.* Rollins, 34 Me. 226.

Where the plaintiff was described in the declaration as the surviving partner of the late firm of Joslyn & Norris, without an averment that there were no other partners, it was held sufficient. Joslyn *v.* Taylor, 24 N. H. (4 Fost.) 268.

In an action brought by A as surviving partner of A & Co., upon a note

(e) Whitehead *v.* Hughes, 2 Cromp. & M. 318.

if bankruptcy had not intervened, must have been brought by their assignees. (*f*) But this was subject to the qualification that bankrupts, whether partners or not, might sue in their own names as trustees for other people. (*g*) By the Bankruptcy act, 1883, a bankrupt partner is not required to join the solvent partners in suing on a joint contract made with the firm; (*h*) and it presumed that the trustee of the bankrupt partner need not be joined in such a case. But the trustee may join in the action if authorized to do so by the Bankruptcy Court; (*i*) and his joinder is necessary where an act of the bankrupt is sought to be impeached. (*k*)[35]

given to A since the death of his partners, the words describing him as surviving partner, &c., may be rejected as surplusage. Kennedy *v.* Richey, 1 Strobh. (S. C.) 4.

Rules of pleading, and evidence in actions against surviving partners.—In *assumpsit* against a surviving partner, it is not necessary to notice the deceased partner in the declaration; but if this is done, the rules of pleading require a negation in the breach of payment by the deceased partner. Culbertson *v.* Townsend, 6 Ind. 64.

In declaring against the surviving partner of a firm, on a note endorsed by the firm, it is not necessary to aver him to be surviving partner. Raborg *v.* Bank of Columbia, 1 Harr. & G. (Md.) 231.

Where a bill is brought against partners, and one of them dies, no revivor against his representatives is necessary, but the bill may proceed against the survivors; and, if it be dismissed for want of such revival, it is error. Hammond *v.* St. John, 4 Yerg. (Tenn.) 107.

(*f*) See Ray *v.* Davis, 8 Taunt. 134. The trustee of a firm may sue for debts owing to the members thereof individually. Stonehouse *v.* De Silva, 3 Camp. 399; Hancock *v.* Haywood, 3 T. R. 433; Scott *v.* Franklin, 15 East 428.

(*g*) See Castelli *v.* Boddington, 1 El. & B. 66; Winch *v.* Keeley, 1 T. R. 619.

(*h*) See 46 and 47 Vict., c. 52, § 114.

(*i*) Id., § 113.

(*k*) See Heilbut *v.* Nevill, L. R., 5 C. P. 478.

35. **Effect of bankruptcy.**—The creditors of a bankrupt partnership cannot be allowed, if there is any joint fund, however small, to prove claims against the separate estate of one of the partners; and the court cannot (under the act of 1841) inquire how the joint fund has been produced. Matter of Marwick, Daveis (U. S.) 229; S. C, 3 N. Y. Leg. Obs. 286; 8 Law Rep. 169.

Where a surviving partner, who has purchased the deceased partner's interest in their stock of goods, of his administrator, makes an assignment for the benefit of his creditors, the partnership creditors will have, as against the firm assets, an equity superior to the separate creditors of the grantor, if the trustees under the assignment knew that partnership assets were included in the deed. Wilson *v.* Soper, 13 B. Mon. (Ky.) 411.

Where a special partnership becomes insolvent, and the members neglect to place their assets in the hands of a proper and responsible trustee, to be distributed among all the creditors of the firm ratably, a creditor of the firm may maintain a bill to enjoin them from

Actions against bankrupt.—As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against trustees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate or by proof and by an action against him if he has not obtained his order of discharge, or if his order of discharge is no bar. When, therefore, it is desired to recover a debt due from a firm, and all the partners are bankrupt, an action is not the remedy unless the partners have not obtained their discharge, or unless the debt could not have been proved in bankruptcy. If, however, some only of *the partners are bankrupt, the solvent partners only need be sued, (*l*) and the Court of Bankruptcy can restrain an action against the bankrupt partner. (*m*)[36]

*290]

making an inequitable distribution of their assets, and for a receiver. Whitewright *v.* Stimpson, 2 Barb. (N. Y.) 379.

(*l*) 46 and 47 Vict., c. 52, § 114. Hawkins *v.* Ramsbottom, 6 Taunt. 178.

(*m*) 46 and 47 Vict., c. 52, § 10 (2). See Ex parte Mills, 6 Ch. 594.

36. Actions against bankrupt.—Where one of two partners, pending an action against them, is adjudged a bankrupt, and the action is consequently stayed as to him, until the determination of the question of his discharge, the action may proceed as to the other defendant. Hogendobler *v.* Lyon, 12 Kan. 276.

Mr. Gow has stated the general doctrine, as follows: "We have seen," says he, "in a former part of this work, that an act of bankruptcy committed by one partner, when followed by a commission, dissolves the partnership by relation to the time when the act of bankruptcy was committed. The partner, therefore, who has committed the act of bankruptcy cannot afterwards communicate to strangers any rights, either against the firm or the joint property, because the commission and assignment retrospectively deprive him of all capacity of acting. They determine his power to bind the firm by relation to the date of his bankruptcy; and all his rights from that time passing to his assignees, he ceases to have any further control over the partnership or the joint property. And the statutes concerning bankrupts make an entire, not a partial, avoidance of the bankrupt's acts, as well in respect of his partner's moiety as his own. Therefore, where a partner, on the eve of his bankruptcy, voluntarily deposited goods with a third person for a creditor of the firm, and the deposit falsely purported to be founded upon a supposed sale, the creditor, after the bankruptcy of the partner, having received information of the deposit, declared his acceptance of it; and in an action of trover by the assignees under a joint commission to recover the goods it was held that the creditor could not resist their claim, inasmuch as the deposit was not completed until after the bankruptcy of the party depositing, at which time the partnership was at an

SECTION II.—SET-OFF.

Closely connected with the subjects discussed in the preceding section is the right of a defendant to set up, in opposition to the claim made against him, a counter-claim which the defendant might himself make the subject of a cross action against the plaintiff. The power of a defendant to do this is much more extensive than it was; for by order XIX., rule 3, a defendant may set off or set up, by way of counter-claim, any right or claim, whether to a definite amount or not; but provision is made for disallowing a cross claim if it cannot be conveniently disposed of in the particular action in which it is set up. A short account, however, of the law as it stood before this alteration may still be useful.

1. *Set-off at law.*—The right of setting off one claim against another appears only to exist at common law, where a person seeks to avail himself of a lien on goods in his possession, but of which he is not the owner. But, by statute 2 Geo. II., c. 22, where there were mutual debts between the plaintiff and the defendant, one debt might beset against the other. (*n*) The statute, however, only applied to debts in the narrow sense of the word, *i. e.*, definite and ascertained sums of money owing by each party to the other, (*o*)

end. So, where two of three partners affecting, but without authority, to bind the firm, by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards, by the direction of such correspondent, drew a bill of exchange in the name of the firm, upon his agent here, which was accepted, payable to their own order, for the amount of the debt; and then the two partners, having in the meantime committed acts of bankruptcy, endorsed such bill to the creditor of the firm in part satisfaction of his debt, and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned, the other partner being all the time abroad, it was held that by such an endorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commission issued, nothing passed to the creditor; for the bankrupt partners had, by relation, ceased, at the time of such endorsement, to have any control over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner." Gow on Partn. (3d ed.), c. 5, § 3, pp. 304–306.

(*n*) 2 Geo. II., c. 22; and see 8 Geo. II., c. 24, as to setting off simple contract debts against specialty debts.

(*o*) See Boddington *v.* Castelli, 1 El. & B. 66, 879; Atwooll *v.* Atwooll, 2 Id. 23; Luckie *v.* Bushby, 13 C. B. 864; and Hutchinson *v.* Sydney, 10 Ex. 438.

and to debts owing to and by each party in the same capacity. (*p*)

*2. *Set-off in equity.*—Courts of equity, although governed in questions of set-off by principles similar to those [*291 which governed courts of law, went further than courts of law in applying those principles, admitting set-off in some cases where courts of law did not, and disallowing it in others where they did. (*q*)

Rules as to set-off.—The combined effect of the rules at law and in equity on the subject of set-off, so far as it is necessary to allude to them in the present treatise, are as follows:

1. Joint debts owing to and by the same persons in the same right can be set off both at law and in equity.

2. Separate debts owing to and by the same person in the same right can also be set off both at law and in equity.

3. Debts not owing to and by the same persons in the same right cannot be set off either at law or in equity. But before the Judicature acts and in considering whether debts were so owing, courts of law regarded the legal right, whilst courts of equity regarded the equitable right; and this led to the following amongst other important practical and different results. (*r*)

Set-off by and against surviving partners.—For example, if a surviving partner was sued at law for a non-partnership debt he could set off a partnership debt owing by the plaintiff to him and his late copartners; (*s*) and in an action by a surviving partner for a debt due to himself separately, the defendant could set off a debt due to himself from the plaintiff and his late partners. (*t*) In equity, however, this could not have been done. When a creditor of a firm seeks to obtain payment of his debt out of the estate of a deceased partner, that creditor cannot set off

(*p*) See Hutchinson *v.* Sturges, Willes 261; Watts *v.* Rees, 9 Ex. 696, and 11 Id. 410; Mardall *v.* Thellusson, 6 El. & B. 976; Pedder *v.* Mayor of Preston, 12 C. B. (N. S.) 535.

(*q*) See, generally, as to set-off in equity, Rawson *v.* Samuel, Cr. & P. 161; Clark *v.* Cort, Id. 154; Freeman *v.* Lomas, 9 Hare 109. See, also, Hunt *v.* Jessel, 18 Beav. 100, as to set-off between creditors and trustees of creditors' deeds. See, also, Agra and Masterman's Bank *v.* Hoffman, 5 N. R. 214, *sed qu.* this case.

(*r*) See Fletcher *v.* Dyche, 2 T. R. 32, and the cases in the next two notes.

(*s*) Slipper *v.* Stidstone, 5 T. R. 493; Golding *v.* Vaughan, 2 Chit. 436.

(*t*) French *v.* Andrade, 6 T. R. 582.

a debt due from himself to the deceased on a separate account; the creditor must pay this last debt in full, and then, as regards the debt in respect of which he sues, rank as any other creditor of the firm against the assets of the deceased. (*u*) It is obvious that if in

*292] such *a case the two debts were set against each other, the separate creditors of the deceased would be paying a joint creditor of the firm, unless the assets of the deceased were sufficient to pay both classes of creditors in full.

On the other hand, debts which were really debts owing to and by a firm could be set off in equity, although not at law. Thus, in Smith *v.* Parkes, (*x*) a firm of three partners covenanted to pay a certain sum of money to the defendant, Parkes, who was indebted to the firm in certain other sums on another account. By the death of two of the members of the firm, the plaintiff, Smith, had become the sole surviving partner, and he was sued by Parkes on the covenant, and judgment was obtained. It was held that notwithstanding the judgment and its effect at law Smith was entitled in equity to set off against the judgment debt the amount of what was due from Parkes to the late firm; and it was also held that Smith had this right, not only as against Parkes, but also against persons to whom he had assigned the debt due to him.

4. *Setting off joint debts against separate, and vice versa.*—Except under special circumstances, a debt due to or from several persons jointly cannot be set off against a debt due from or to one of such persons separately. (*y*) This rule, which is really involved in the last, also prevailed before the Judicature acts, both at law and in equity, (*z*) and was of great importance to partners. It scarcely requires to be pointed out that to allow a set-off of such debts would be to enable a creditor to obtain payment of what is due to him from persons in no way indebted to him. As a rule, therefore, a debt owing by one of the members of a firm cannot be set off at law against a debt owing to him and his copartners; (*a*) nor can a

(*u*) Addis *v.* Knight, 2 Mer. 117.

(*x*) 16 Beav. 115.

(*y*) See Kinnerley *v.* Hossack, 2 Taunt. 170; Cheetham *v.* Crook, McLel. & Y. 307; Vulliamy *v.* Noble, 3 Mer. 618. See, also, Jebsen *v.* East and West India Dock Co., L. R., 10 C. P. 300.

(*z*) It cannot be done in equity, even in cases of fraud. See Middleton *v.* Pollock, 20 Eq. 515.

(*a*) Gordon *v.* Ellis, 2 C. B. 821; France *v.* White, 8 Scott 257.

debt owing to one of the members of a firm be set off against a debt owing by him and his copartners. (*b*) And this rule applies even where one partner only has been dealt with, and *the debts sought to be set against each other are a debt owing [*293 by him, and a debt owing to him and others, but arising out of transactions with him alone.

This last point is well illustrated by Gordon *v.* Ellis. (*c*) There, an action was brought by three partners for the recovery from the defendant of money received by him for goods of the plaintiffs sold by the defendant on their account. The defendant pleaded, in effect, that he had been employed by A only, that A sent the goods for sale as if they were his own, and that the goods were sold by the defendant as A's goods, and that A was indebted to the defendant in a larger amount than that sought to be recovered in the action. It was admitted that if B and C had by their conduct induced the defendant to believe that A was the sole owner of the goods in question, and to deal with A on that supposition, the defendant would have had a good defence to the action; but it was held that as the defendant did not allege that such had been the case his plea was a mere attempt to set off a debt due from one member of the firm against a debt due to the firm itself, and was bad.

In strict analogy to the above rule it has been decided in equity that if the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm on the partnership account, the bankers have no lien for such balance on what may be due from themselves to the members of the firm on their respective separate accounts, and that the debt due to the bankers from the partners jointly cannot be set off against the debts due from the bankers to the partners separately. (*d*)[37]

(*b*) Arnold *v.* Bainbridge, 9 Ex 153; McGillivray *v.* Simson, 2 Car. & P. 320; Boswell *v.* Smith, 6 Car. & P. 60.

(*c*) 2 C. B. 821; and see the same case, 7 Man. & G. 607, where it will be observed the plea was materially different.

(*d*) See Watts *v.* Christie, 11 Beav. 546; Cavendish *v.* Geaves, 24 Id. 173.

37. **Set-off of joint debts against separate, and vice versa.**—A defendant may set up in his defence, under the general issue, that the plaintiff is one of a partnership, and that the firm is indebted to him in a larger sum than that which the plaintiff demands, it being a part of the same transaction. Buck-

Effect of Judicature acts.—The Judicature acts have extended the equitable principles of set-off to all actions in the high court;(*e*)

ingham *v.* Burgess, 3 McLean (U. S.) 364.

The fact that a creditor of the firm is indebted to one of the partners does not, by operation of law, extinguish the partnership debt, although such partner may offset or oppose his claim against that of the creditor of the firm, by way of defence to an action brought by such creditor against the firm. Beauregard *v.* Cass, 91 U. S. 134.

The holder of a claim against an individual member of a firm, who purchases from such member what he knows to be partnership goods, cannot, in an action by the partners or their assignee for the amount of such goods, plead such claim either in payment or set-off against the partners, unless, by their assent, the copartnership property was delivered in payment of the individual partner's debt. Wise *v.* Copley, 36 Ga. 508. See, also, Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174.

In an account between the administrator of a partner deceased, insolvent, and a surviving partner, the individual claim of the survivor against the deceased cannot be taken into the account and deducted from the balance in the survivor's hands. Berry *v.* Powell, 18 Ill. 98.

According to the construction placed upon the statute allowing partners to be sued severally, it does not authorize a demand due by the firm to be set off against a separate debt due to one of the partners. Hoyt *v.* Murphy, 18 Ala. 316.

The *dictum* contained in Taylor *v.* Bass, 5 Ala. 110, that a mere assent of the other partners to the exclusive use and appropriation of a debt due the firm by one of the partners, converts such debt into a proper subject to set-off by him, when sued alone on an individual liability, disapproved. Jones *v.* Blair, 57 Ala. 457.

Partners may set off claims held jointly, but not individually. Sager *v.* Tupper, 38 Mich. 259.

Where one partner executed a bond in the name of the firm, under seal, for a debt due by the firm, in an action by the obligee on such bond, a debt due by the obligee to the firm was a good set-off, notwithstanding the plaintiff is allowed to enter a *nol. pros.* as to one of the firm, and proves that only the partner retained as defendant signed the instrument. Sellers *v.* Streator, 5 Jones (N. C.) L. 261.

But in Montz *v.* Morris, 89 Pa. St. 392, it was held that one partner may, with the assent of the others, in an action against them individually, set off a debt due to the firm by the plaintiff; and that proof of the account and such assent to its use are all that is required, an assignment of account to the defendant interposing the set-off being unnecessary.

The private debt of one copartner cannot be set off against a copartnership demand. Powrie *v.* Fletcher, 2 Bay (S. C.) 146. S. P. in New York, Ladue *v.* Hart, 4 Wend. (N. Y.) 583.

Illustrations.—The plaintiff, one partner of a firm, upon a dissolution thereof, sold all his interest in the property and debts due the firm to the defendant, the other partner, and the de-

(*e*) See sections 24 and 25 (6) (11) of the Judicature act, 1873.

and notwithstanding the rules relating to joint and to several claims, (*f*) the old rule precluding the set-off of a joint against a separate debt, or *vice versa*, is still in force. (*g*)

*294] *Exceptions to general rule.*—To the general rule which precludes the set-off of a debt due to a firm against a debt owing by one of its members, and *vice versa*, there are, however, a few exceptions.

Agreement.—If it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all, or *vice versa*, effect will be given to that agreement, and the application of the general doctrine in question will thereby be precluded. Regard, therefore, must be had to any agreement which the parties themselves may have come to, and to their course of dealing with each other. (*h*)

So, if a joint and several promissory note is made by partners, and one of them sues the payee for some separate demand, the de-

fendant gave the plaintiff a promissory note and a bond of indemnity against the liabilities of the firm. *Held*, that the defendant could not set off against said note an account due from the plaintiff to the firm at its dissolution. Lesure *v.* Norris, 11 Cush. (Mass.) 328.

In an action by two partners for the price of goods sold, defendant proved that both plaintiffs had boarded with him, and had each told him that "what one might call for would be the same as if both should order it." *Held*, that his counter-claim for liquors and cigars furnished to each of the plaintiffs while so boarding with defendant should be allowed in defence *pro tanto*. Hartung *v.* Siccardi, 3 E. D. Smith (N. Y.) 560.

A, the partner of B, assigned all his interest in the partnership effects to B, with power to settle and compromise *Held*, that B might set off a debt due to the firm against a debt due by himself alone. Craig *v.* Henderson, 2 Pa. St. 261.

Where a partner retired from the firm, and a new firm was formed, which undertook to pay the debts of the old firm, but failed, leaving debts of the old firm unpaid which the retiring partner had to pay, it was held that he might set off such payment against a bond which he had given to the new firm, and which they had assigned to A for value. Hupp *v.* Hupp, 6 Gratt. (Va.) 310.

(*f*) Ord. XVI., rr. 1, 4, 6, *ante* p. *282.

(*g*) Bowyear *v.* Pawson, 6 Q. B. D. 540. However, in Manchester, Sheffield and Lincoln Rail. Co. *v.* Brooks, 2 Ex. D. 243, a separate debt was allowed to be pleaded by way of set-off to an action for a joint debt. This can hardly have been right.

(*h*) See Vulliamy *v.* Noble, 3 Mer. 593; Downam *v.* Matthews, Pr. in Ch. 580; Cheetham *v.* Crook, McLel. & Y. 307; Kinnerley *v.* Hossack, 2 Taunt. 170.

fendant can set off the note; for, *ex hypothesi*, it is the several note of the partner suing him. (*i*)

An agreement by one partner that a debt due from himself separately shall be set off against a debt due to him and his copartners jointly is *prima facie* a fraud on them, and a set-off founded on such an agreement cannot, it is apprehended, be maintained in the absence of special circumstances rendering such an agreement binding on the other partners. (*k*)

Another exception occurs where one partner has been allowed by his copartners to act as if he were a principal and not an agent of the firm.

Set-off where there is a dormant partner.—It has been seen that dormant partners may join their copartners in suing on contracts entered into in form with the latter only. But dormant partners cannot, by coming forward and suing on such contracts, deprive the defendant of any right of set-off of which he might have availed himself if the non-dormant partners only had been plaintiffs. This was held by *Lord Kenyon in Stracey *v.* Deey, (*l*) where [*295 the plaintiffs, Stracey, Ross and others, were in partnership as grocers, and Ross was the only person who appeared to the public as concerned in the partnership business. The defendant had dealt with Ross and had become indebted for grocery supplied by him. On the other hand, the defendant had expended money for Ross, and had done so on the supposition that the moneys thus expended could be set off against what was due for the grocery. The plaintiffs, however, contended that this set-off could not be made; but Lord Kenyon held that as the defendant had a good defence by way of set-off against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the defendant

(*i*) See Owen *v.* Wilkinson, 5 C. B. (N. S.) 526.

(*k*) Wallace *v.* Kelsall, 7 Mees. & W. 264, is the other way, but is to be explained by the old technical rules of pleading, which are now abolished, see *ante* p. *269. Piercy *v.* Fynney, 12 Eq. 69; Nottidge *v.* Pritchard, 2 Cl. & F. 379.

(*l*) 7 T. R. 361, note, and 2 Esp. 469. See, too, Teed *v.* Elworthy, 14 East 213, and De Mautort *v.* Saunders, 1 B. & Ad. 398, overruling Dubois *v.* Ludert, 5 Taunt. 609.

the same advantages and equities in his defence as he would have had in an action brought by Ross solely. (*m*)

In this case all the partners except Ross were dormant, and by the terms of the agreement into which all had entered, Ross alone was to be the apparent trader. His copartners were therefore simply in the position of undisclosed principals, and were treated accordingly by the court. [38]

Cases where one partner only has been dealt with.—In Gordon *v.* Ellis, (*n*) which has been before referred to, an attempt was made to extend the principle on which Lord Kenyon decided Stracey *v.* Deey to all cases in which one partner only transacts the business of the firm and becomes himself indebted to the person with whom he deals. But it was held, and rightly, that a person liable to be sued by a firm cannot set off a debt due from one only of its members on the ground that he only was dealt with by the defendant, unless it can be shown that the other members of the firm induced the defendant by their conduct to treat their copartner as the only person with whom the defendant had to do. (*o*)

*296] *But here again it is to be observed that if the debt due from one partner can be treated as due from the firm, that debt may be set off against another debt due to it. This is illustrated by the same case of Gordon *v.* Ellis, (*p*) where, in an action by a firm for money due to it from the defendant for goods of the firm sold by him, the latter was held entitled to set off a debt due to him for an advance made by him to one of the partners on account of those goods. The court thought that although the money was ad-

(*m*) See Cooke *v.* Eshelby, 12 App. Cas. 271; George *v.* Clagett, 7 T. R. 359; Borries *v.* Imperial Ottoman Bank, L. R., 9 C. P. 38.

38. Set-off where there is a dormant partner.—If A, a member of a firm, deal in his own name in business of the firm with B, who is ignorant of the partnership, B may be sued for a demand against him, arising from such dealing, either by A alone or by the firm. And in a suit by the firm for such demand, B's right of set-off is the same as if B had sued alone. Ward *v.* Leviston, 7 Blackf. (Ind.) 466.

Where suit is brought by ostensible and dormant partners the defendant may set off all debts due from the ostensible partners separately. Lord *v.* Baldwin, 6 Pick. (Mass.) 352.

(*n*) 2 C. B. 821, *ante* p. *293.

(*o*) See Ramazotti *v.* Bowring, 7 C. B. (N. S.) 851; Bonfield *v.* Smith, 12 Mees. & W. 405; *ante* p. *280; and Baring *v.* Corrie, 2 B. & A. 137.

(*p*) 7 Man. & G. 607.

vanced to one partner only, the defendant had a right to treat it as an advance to the firm made on that partner's requisition whilst acting within the scope of his apparent authority as agent of the firm. In point of fact, the defendant, instead of waiting until he had sold the goods and then handing over the money produced by their sale, made a payment on account, and he sought nothing more than to have the amount so prepaid deducted from the sum for which he sold the goods.[39]

Attempt to avoid set-off by suing one partner.—It sometimes happens that in order to avoid a defence of set-off, a plaintiff who is indebted to a firm sues one of its members alone for a debt owing to the plaintiff by the firm. In such a case the defendant may require his copartners to be joined. (*q*) Again, if a firm holds the note of a person to whom it is itself indebted, and in order to deprive him of his right of set-off, endorses the note to one of its members, and he alone sues on it, a defence disclosing the facts and setting off the debt owing to the defendant by the firm will be good. (*r*)

Set-off where there has been an assignment.—The provision of the Judicature acts relating to the assignment of debts (*ante* p. *285) has greatly facilitated defences by way of set-off where there has been a change in a firm. The principles applicable to such cases are well illustrated by the following decision :

In Cavendish *v.* Geaves (*s*) the plaintiff was indebted on bonds to a firm of bankers. Many changes in the firm took *place and the bonds in question were on each change assigned by [*297 the old to the new firm. The plaintiff had an account with the bank as one of its customers, and when the bank stopped payment a balance was owing to him on that account; but the bonds had

39. **Cases where one partner only has been dealt with.**—Where one of two law partners sues individually for work which has been uniformly done in the plaintiff's name, defendant may set off a demand against the firm. Platt *v.* Halen, 23 Wend. (N. Y.) 456.

(*q*) Ord. XVI., r. 11. See Stackwood *v.* Dunn, 3 Q. B. 823, and Bonfield *v.* Smith, 12 Mees. & W. 405.

(*r*) Puller *v.* Roe, 1 Peake N. P. 260.

(*s*) 24 Beav. 163. See, also, Jefferys *v.* Agra and Masterman's Bank, 2 Eq. 674; and as to set-off at law as against the assignee of a debt after notice of the assignment. Watson *v.* Mid-Wales Rail. Co., L. R., 2 C. P. 593.

been previously assigned to third parties, without notice, however, to the plaintiff. The question then arose whether, notwithstanding the various changes in the firm, and the assignment of the bonds, the plaintiff was entitled to set off, against the debt due from him on the bonds, the amount due to him as a customer of the bank, and it was held that he was. The judgment in this case is peculiarly instructive, and the following extract from it is submitted to the reader without apology.

Effect of assignments and of changes in firm on right of set-off.—"If a customer borrow money from his bankers, and give a bond to secure it, and afterwards, on the balance of his general banking account, a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity. (*t*)

"If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment were given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond, and the debtor on the general account would be different persons; but, as in equity, the persons entitled to the bond and the debtors on the general account would be the same persons, a right to set-off would exist in this court, and the customer would, in equity, be entitled to set off the balance due to him against the bond debt due from him.

"If, after the bond had been given, it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter on account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

"But, if notice of that assignment had been given to the original debtor, no right of set-off would exist in this court for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm, with *notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees. *298]

"If, after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment

(*t*) Roxburghe *v.* Cox, 17 Ch. D. 520.

had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would, in equity, be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."

The court, after laying down these general propositions, came to the conclusion on the evidence in the case that the plaintiff was informed that the successive firms with which he dealt as customers were his creditors in respect of the bonds, but that he had no notice of their assignment by the firm which stopped payment to the holders of them, and that therefore he was entitled, even as against such holders, to set off what was due to him as a customer of the bank when it stopped payment.

The above decisions are sufficient to show that in allowing debts to be set off against each other, courts of equity went far beyond courts of law, although they did not introduce any new principle of set-off. The truth of this was still more apparent from the cases in which set-off was not allowed, one of the debts being joint, and the other several only.

SECTION III.—OF EXECUTION AGAINST PARTNERS FOR THE DEBTS OF THE FIRM.

Execution against partners.—If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ. (*u*) But, although the writ of execution on a joint judgment must be joint in form, it may be *levied* upon all, or any one or more of the persons named in it; for each is liable to the judgment creditor for the whole, and not for a proportionate part of the *sum [*299 for which judgment is obtained. (*x*) The consequence of

(*u*) See Penoyer *v.* Brace, 1 Ld. Raym. 244; Clarke *v.* Clement, 6 T. R. 526; 2 Wms. Saund. 72, *l*; Bac. Ab. "Execution," G, 1.

(*x*) See per De Grey, C. J., in Abbot *v.* Smith, 2 Wm. Bl. 949; and Herries *v.* Jamieson, 5 T. R. 556, per Lord Kenyon.

this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, *or* on the separate property of any one or more of them, *or* both on their joint and on their respective separate properties; and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper. (*y*) Of course, if the judgment creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against any of the others; (*z*) but the important point to observe is that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.

Similar rules are applicable to attachments of debts under the Common Law Procedure act, 1854 (17 and 18 Vict., c. 125, § 61), it having been determined that a judgment creditor of three persons can, under the act in question, attach debts owing to any one or more of his judgment debtors. (*a*)

The extent to which the right to levy execution against the effects of a firm is affected by bankruptcy will be examined hereafter.

The procedure on a judgment against a firm (*b*) is regulated by order XLII., rule 10, which is as follows:

Execution against partners on judgment against firm.—Where a judgment or order is against a firm, execution may issue:

(*a*) Against any property of the partnership;

(*b*) Against any person who has appeared in his own name under order XII., rule 15, or who has admitted on the pleadings that he is, or has been adjudged to be a partner;

(*c*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave so to do; and the court or judge may give such
*300] leave if the liability be not disputed, or, if such liability *be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

(*y*) See Jones *v.* Clayton, 4 Man. & S. 349.

(*z*) See Com. Dig., "Execution," H.

(*a*) Miller *v.* Mynn, 1 El. & E. 1075.

(*b*) The firm here means the partners when the cause of action accrued, *ante* p. *265.

It is not clearly said in this rule that execution must first be levied against the joint estate of the firm before having recourse to the separate estates of the members; and, having regard to the previous well-established practice, the rule cannot be construed as rendering such a course necessary.

The proper mode of entering up judgment has been already considered, *ante* p. *266.

Execution on judgment against firm.—If judgment is entered up against a firm in its mercantile name, execution can only issue without leave against the property of the firm (*c*) or against those persons specially mentioned in order XLII., rule 10; other persons sought to be made liable must be proceeded against in some other way and some judgment or order must be obtained against them establishing their liability before execution can issue against them. (*d*) An action founded on the judgment may be brought against them, and it is not necessary to proceed by an issue and an order under the rule. (*e*) But the judgment cannot be made the foundation of a debtor's summons in bankruptcy against them if they dispute their liability; for, in the case supposed, their liability in respect of the judgment has not yet been established. (*f*)[40]

The mode of taking in execution the share of one partner on a separate judgment against him will be examined hereafter. See book III., ch. 5, § 4.

(*c*) If there is a receiver, application must be made to the court. Kewney *v.* Attrill, 34 Ch. D. 345.

(*d*) Davis *v.* Morris, 10 Q. B. D. 436.

(*e*) Clark *v.* Cullen, 9 Q. B. D. 355.

(*f*) Ex parte Young, 19 Ch. D. 124; Ex parte Blain, 12 Ch. D. 522, where the alleged debtor was a foreigner residing abroad.

40. **Executions against partners on judgment against firm.**—In the United States courts, partnership property may be held for a partnership debt, though judgment can be obtained only against one partner, by reason of the other's being out of the jurisdiction. Inbusch *v.* Farwell, 1 Black (U. S.) 566.

Partnership creditors have no lien on the partnership effects, until they have obtained judgment, in the case of land, or execution in case of personalty. Reese *v.* Bradford, 13 Ala. 837. S. P., Mayer *v.* Clark, 40 Ala. 259.

The entire assets of a partnership are, in equity, subject to the payment of its debts. Coster *v.* Bank of Georgia, 24 Ala. 37.

While the legal title of partnership property remains in the firm, a creditor may pursue his remedy against it, at law, in the same manner as against an individual debtor. But when the legal title has been conveyed to a third person *bona fide*, the creditor can pursue the

property only by a bill in equity to marshal the assets and enforce his equitable lien. Stokes *v.* Stevens, 40 Cal. 391.

An execution against a firm has the preference over one against an individual partner; but where property is sold on an execution against a partner, though after the delivery of the execution against both partners, it is a valid sale if sufficient time had not elapsed for advertisement and sale under the other execution. Fenton *v.* Folger, 21 Wend. (N. Y.) 676.

The mere insolvency of a partnership does not, of itself, work such a legal or equitable appropriation of its effects, in the absence of any proceedings for a *pro rata* distribution, as to prevent a judgment creditor from making his debt out of the effects by execution, or to prevent him from removing fraudulent obstructions or assignments intended by the debtor to hinder the execution. Greene *v.* Breck, 32 Barb. (N. Y.) 73.

—on judgment against one partner.—A creditor of an individual partner has only a right to sell what of the partnership property belongs to the debtor partner, after paying the debts due by the firm, and his own debt to the firm. Merrill *v.* Rinker, 1 Baldw. (U. S.) 528; Lyndon *v.* Gorham, 1 Gall. (U. S.) 367. S. P. in state courts: White *v.* Dougherty, Mart. & Y. (Tenn.) 309; M'Carty *v.* Emlen, 2 Yeates (Pa.) 190; Dower *v.* Stanffer, 1 Penn. (N. J.) 198; Knox *v* Schepler, 2 Hill (S. C.) 595; Knox *v.* Summers, 4 Yeates (Pa.) 477; Tappan *v.* Blaisdell, 5 N. H. 189; Pierce *v.* Jackson, 6 Mass. 242; Fish *v.* Herrick, 6 Id. 271.

The levy of an execution against one partner on a piece of land belonging to the firm gives the execution purchaser no title, legal or equitable to the land; the levy should be on the partner's interest in the joint stock, and a sale thereof would give the purchaser a right to an account and division. Clagett *v.* Kilbourne, 1 Black (U. S.) 346.

If an officer attach and take possession of personal property of a firm in Massachusetts, on a writ against one partner who has no equitable interest in such property, he is a trespasser. Cropper *v.* Coburn, 2 Curt. (U. S.) 465.

Under an execution against one of two partners, the sheriff may seize the goods of the firm, and sell the interest of the judgment debtor, in which case the vendee will hold the goods in common with the other partner. United States *v.* Williams, 4 McLean (U. S.) 236.

A purchaser under an execution against one partner, in his separate capacity, becomes a tenant in common with the other partners, in an undivided share of the land which he purchases, and holds it subject to all the rights of the other partners, and can have no claim but upon the separate interest of the individual partner in the residue which may remain after the partnership debts are paid. Gilmore *v.* North American Land Co., Pet. (U. S.) C. C. 460.

Upon execution against one partner, the sheriff may levy on that partner's undivided interest in goods, and take the goods into his exclusive possession, and that though the firm debts exceed the firm effects. Andrews *v.* Keith, 34 Ala. 722.

Before the joint property of a firm can be applied to private debts, all debts of the partnership must be settled. Chase *v.* Steel, 9 Cal. 64; Collins *v.* Butler, 14 Cal. 223; Burpee *v.* Bunn, 22 Cal. 194.

The sheriff can levy on the interest of one partner in the firm goods, but must sell subject to the rights of firm creditors.

and of the other partners. Jones *v.* Thompson, 12 Cal. 191.

A judgment lien against one of the partners of a firm, individually, constitutes a lien on the interest of that partner in the partnership property, which entitles the purchaser of it, when sold, to possession, divested of liens for firm debts not reduced to judgments. Green *v.* Ross, 24 Ga. 613.

Where partnership property is sold on an execution against an individual partner, the firm cannot maintain trover against the purchaser for the property. The only remedy for the other partner is in equity. White *v.* Woodward, 8 B. Mon. (Ky.) 484.

An execution against one of two partners may be levied on the partnership effects. Wiles *v.* Maddox, 26 Mo. 77.

A sale of partnership property, under a separate execution against one partner, operates as a dissolution of the partnership. Renton *v.* Chaplain, 1 Stock. (N. J.) 62.

Illustrations.—A, residing in the country, and B in the city of New York, both produce dealers, made an arrangement by which they carried on their business in connection, the profits at both places to be divided between them, intentionally concealing the arrangement made. B incurred a debt to C in the course of his business, confessed a judgment, and the execution was levied on the property used in the business carried on by B. A claimed the property as partnership property. *Held*, that the levy was just and legal, the creditor C having a right to look to the property of A to pay his debt. Van Valen *v.* Russell, 13 Barb. (N. Y.) 590.

A judgment was recovered against a partnership on confession of one of the partners. Execution was issued thereon, and the partners paid the amount to the sheriff after a levy on partnership property. Afterwards, the judgment was reversed as to the partner who was not a party to it. *Held*, that the plaintiff in execution was entitled to recover of the sheriff the amount received by him on the execution. Harper *v.* Fox, 7 Watts & S. (Pa.) 142.

S. and T., trading as partners, made several assignments, each of his private property and interest in the firm, on successive days, to the same assignees, who accepted both trusts. Afterward a firm creditor issued execution and levied upon the partnership property. *Held*, that in the absence of proof to the contrary, the assignment of the firm property to assignees by one of the firm was assented to by the other, and that the partnership property vested in the assignees, and could not be levied upon by the sheriff, after the assignments had been made and accepted. McNutt *v.* Strayhorn, 39 Pa. St. 269.

*BOOK III. [*301

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF PARTNERSHIPS BETWEEN THEMSELVES.

CHAPTER I.

OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE AFFAIRS OF THE FIRM.

Each member of partnership entitled to take part in its management.—In partnerships, the good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition, so that each may see that the other is carrying it on for their mutual advantage. (*a*)

In the absence of an express agreement to the contrary, the powers of the members of a partnership are equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern. (*b*) Moreover, if two persons are in partnership, and one of them mortgages all his share and interest therein to the other, the latter will not be permitted, during the continuance of the partnership, to avail himself of his rights as a mortgagee and to exclude his copartner from interference in the partnership. (*c*) Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the court between partners, as the improper exclusion of one of them by the others from taking part in the management of the partnership business. (*d*)[1]

(*a*) Per Lord Eldon in Peacock *v.* Peacock, 16 Ves. 51.

(*b*) Rowe *v.* Wood, 2 Jac. & W. 558; see, too, Lloyd *v.* Loaring, 6 Ves. 777.

(*c*) Rowe *v.* Wood, 2 Jac. & W. 558.

(*d*) See, in addition to the cases last cited, Goodman *v.* Whitcomb, 1 Jac. & W. 589; Marshall *v.* Colman, 2 Id. 266.

1. Each member entitled to take part in the management.—Where one

*302] **Unless otherwise agreed.*—It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their number, exclusively of the others, and that where such an agreement is entered into, it is not competent for those who have agreed to take no part in the management, to transact the partnership business without the consent of all the other partners. But, as was seen in an earlier part of the treatise, every member of an ordinary firm is *prima facie* its agent for carrying on its business in the usual way; (*e*) and persons dealing with a partner within the limits of his apparent authority, are entitled to hold the firm answerable for his conduct, unless such persons had distinct notice that his real authority was less extensive than they had a right to assume it to be. [2]

of two partners is insolvent, the solvent partner has a right to liquidate the affairs of the firm, and to take them out of the hands of the insolvent for that purpose; but this right may be waived by permitting the insolvent partner to administer the assets. Vetterlein *v.* Barnes, 6 Fed. Rep. 693. But the mere fact that a partnership may happen to be in debt, does not give one partner the right to prevent the other from taking possession of the partnership property. Carithers *v.* Jarrell, 20 Ga. 842.

While, in law partnerships, either partner may attend to business entrusted to the firm, yet if the firm contract with a client for the personal services of a particular partner, who fails to perform them, it is a breach of contract. But the damages for such breach will be but nominal, if another party performs the duty with due professional skill, and without injury to the client. Smith *v.* Hill, 13 Ark. 173.

An association or partnership cannot exclude or expel a member for refusing to do an act not required by the constitution or laws when he joined, and entirely foreign to the purposes of the association. Gorman *v.* Russell, 14 Cal. 531. See, also, Sweet *v.* Morrison, 2 N. Y. St. Rep. 781; S. C., 4 Cent. Rep. 212.

(*e*) *Ante* book II., ch. 1.

2. **Unless otherwise agreed.**—The assent of any one of the partners to the acts of their agent would be good evidence affecting the rest, unless, by the articles or constitution of the company, the whole concern and management should be entrusted to a committee or board of managers, in which case the assent must be proved to have been given by them, or some of them, pursuant to the authority delegated to them by the company. Odiorne *v.* Maxcy, 13 Mass. 178; S. C., 15 Id. 39.

Evidence, both direct and circumstantial, is admissible to prove that the sole power of conducting the business of a firm has been given to one partner. Such power may be inferred from the conduct of the partners for a series of years, as that one has exclusively conducted the business of the firm, and the other partner has never questioned his acts, or assumed to conduct the business himself.

*CHAPTER II. [*303

OF THE GENERAL DUTY OF PARTNERS TO OBSERVE GOOD FAITH.

SECTION I.—PRELIMINARY REMARKS, *303.
SECTION II.—OF THE OBLIGATION OF PARTNERS NOT TO BENEFIT THEMSELVES AT THE EXPENSE OF THEIR COPARTNERS, *305.
SECTION III.—OF THE POWERS OF A MAJORITY OF PARTNERS, *313.

SECTION I.—PRELIMINARY REMARKS.

High standard of honor requisite among partners.—In societatis contractibus fides exuberet. (*a*) The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. (*b*) Thus, if one partner knows more about the state of the partnership accounts than another, and, concealing what he knows, enters into an agreement with that other relative to some matter

It is proper to show any reason existing, or expressed by the partners, why it was not desirable or desired that the other should conduct the business, as that he had little interest in the concern, while the interest of the managing partner was large. Anthony *v.* Wheatons, 7 R. I. 49.

Where one permits another to buy stock on their joint account, in anticipation of forming a partnership, and immediately afterwards repudiates the agreement to become a partner, he is not entitled to any of the property bought, nor are his individual creditors. Rice *v.* Shuman, 43 Pa. St. 37.

(*a*) Cod. IV., tit. 37, l. 3.

(*b*) See Blisset *v.* Daniel, 10 Hare 522, 536. Compare Cassels *v.* Stewart, 6 App. Cas. 64, noticed *infra*, which shows how difficult it is to apply this general principle.

as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand. (*c*) [1]

And among those about to become partners, and who have ceased to be partners.—This obligation to perfect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists; (*d*) [2] and also to persons who have dissolved partnership, but who have not completely wound up and settled the partnership affairs; (*e*) and most especially is good faith

*304] required to be observed when one *partner is endeavoring to get rid of another, or to buy him out. (*f*) [3]

(*c*) See Maddeford *v.* Austwick, 1 Sim. 89.

1. **High standard of honor among partners.**—Where one partner, who is in sound health, was made sole agent of the partnership, by another who was not, and who relied on him wholly for true accounts, and the party thus made agent managed the business at a distance from the other, communicating to him no information—*Held*, that the relation of partnership, whatever it may be in general, became, under such circumstances, fiduciary, and the law governing fiduciary relations was applicable. Brooks *v.* Martin, 2 Wall. (U. S.) 70.

A and B being partners, A, without the consent of B, borrowed money at an extra rate of interest, on the credit of the company, to pay his private debts, and credited the company with the money so applied and the legal interest only. *Held*, that the excess of interest thus paid by the company beyond the amount credited to the company was a proper charge against A. Tomlinson *v.* Ward, 2 Conn. 396.

(*d*) See Hichens *v.* Congreve, 1 Russ. & M. 150; Fawcett *v.* Whitehouse, Id. 132.

2. **And among those about to become partners.**—In the negotiations preliminary to the taking in of a new partner, there is no confidential relation between the parties until the partnership is formed. In such a case, it is not improper to put in the stock and machinery of the old business, at a price fixed arbitrarily between the parties, as one of the conditions of the new arrangement. Uhler *v.* Semple, 5 C. E. Gr. (N. J.) 288.

(*e*) See Lees *v.* Laforest, 14 Beav. 250; Clegg *v.* Fishwick, 1 Macn. & G. 294; Perens *v.* Johnson, 3 Sm. & G. 419; Clements *v.* Hall, 2 De G. & J. 173.

(*f*) Blisset *v.* Daniel, 10 Hare 493; Maddeford *v.* Austwick, 1 Sm. 89; Perens *v.* Johnson, 3 Sm. & G. 419; Chandler *v.* Dorsett, Finch 431. As to withholding information, see McLure *v.* Ripley, 2 Macn. & G. 274.

3. **And among those who have ceased to be partners.**—Partners are *quasi* trustees for one another, even after dissolution; if one retires, or becomes bankrupt, or dies, that one's representatives and the other partners still remain *quasi* trustees. Hoyt *v.* Sprague, 8 Rep. 616.

After dissolution, each partner becomes a trustee for the others as to the partnership funds in his hands, in order to effect a fair settlement and just distribution of the effects, and he will not be allowed to

Each must do his duty.—Notwithstanding the universal application to partners, of the rule requiring perfect good faith, if one partner repudiates the contract of partnership and will not perform

make a bargain with his former copartners advantageous to himself; but before dissolution no such relationship exists. Stephens *v.* Orman, 10 Fla. 9.

After dissolution, equity will restrain one partner from publishing the letters of another concerning the business of the firm, unless the purposes of justice, civil or criminal, require their publication. Roberts *v.* McKee, 29 Ga. 161.

The remaining partners, after a dissolution, are entitled to the possession of the effects for the purpose of settling up the concern, and without interference, unless for good cause shown, on the part of strangers who may have purchased the shares of retiring partners. Reece v. Hoyt, 4 Ind. 169.

That upon a dissolution the partners settled on the hypothesis that a firm debt was settled by the note of one, is not to be presumed, but is for the jury to decide. Tyner *v.* Stoops, 11 Ind. 22.

A partner, on dissolution, appointed agent and receiver, although he have an interest, is only trustee for the other partners. Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506.

After dissolution and an assignment by one partner to the other of all his interest in the book debts and demands of the firm, with power to collect them for his own benefit, an attempt by the partner so assigning to control one of those demands against himself, and to direct that it should not be allowed in set-off, can have no effect. Davis *v.* Briggs, 39 Me. 304.

Where the articles of copartnership provide that on dissolution of the copartnership, its effects shall be divided among the partners, the partners become, on such dissolution, merely tenants in common, and no one of them can set off or sell the share of the other without his consent. Phillips *v.* Reeder, 3 C. E. Gr. (N. J.) 95.

If, after dissolution, either party continues the use of the partnership property, he may be required to account for such use, although it was only a partnership in proceeds, and not in the stock. Pine *v.* Ormsbee, 2 Abb. (N. Y.) Pr. (N. S.) 375.

There is nothing in the relation of partners which makes a mortgage, given by one to the other on dissolution of the partnership, to indemnify him against the partnership debts, fraudulent. Whitmore *v.* Parks, 3 Humph. (Tenn.) 95.

After the dissolution of a firm, one of its members cannot act as the agent of a creditor of the firm, in holding obligations due the firm, as collateral security for a note due from the firm to such creditor, and taking a conveyance of land in settlement of such an obligation; and, in such a case, the creditor, in an action on the firm note, is not bound to account for the value of such land, or of such alleged collaterals, where it appears they were never in his possession, that he never authorized such alleged agent to hold them for him, and never received any payments thereon, and that the land was not conveyed to him, but to such alleged agent. Pray *v.* Morse, 41 Wis. 343.

The relation of trustees towards each other, if it exists during partnership, certainly ceases, in Illinois, when the firm is dissolved and the business is closed. Pierce *v.* McClellan, 93 Ill. 245. And, in Massachusetts, a partner is no

his duty towards his copartners, he cannot justly complain if they in return decline to treat him on a footing of equality with themselves. (*g*) As observed by Lord Eldon, in Const *v.* Harris: "A partner who complains that the other partners do not do their duty towards him must be ready at all times and offer himself to do his duty towards them." (*h*) But if a partner has been set at defiance by his copartners, if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them. (*i*)

A partner whose rights are denied should be prompt in asserting them, or he may be seriously prejudiced. This subject will be further adverted to in that part of the work which relates to the defences to actions between partners. (*k*) [4]

longer a trustee for his partner after the partnership was dissolved, and an insurance broker ceases to be trustee for the underwriters when he leaves his office; and a settlement by such a party, with the administrators of his former principal or partner, will be sustained if it is not actually or constructively fraudulent, although advantageous to the party; and in this he differs from one who is strictly a trustee, such a one being scarcely allowed to purchase at all of his *cestui que trust*. Farman *v.* Brooks, 9 Pick. (Mass.) 212.

Illustrations.—Where one of two copartners sold out his interest in the copartnership assets to the other, taking back an agreement that the purchaser would pay the partnership debts, and the latter, instead of paying them, caused them to be brought up in the name of a confederate, and judgment to be obtained thereon, on which the lands of the other copartner were sold to such confederate, it was held that those sales should be set aside as fraudulent and void, on behalf of one to whom the owner had conveyed the lands, and that it was not necessary for the complainant to show that he had purchased and paid a valuable consideration for the lands. Reed *v.* Wessel, 7 Mich. 139.

On giving up the business, one partner sold property of the firm and rendered an account for the same at $4000. He had sold the property to another, to resell, and divide the profits with him, and the profits were actually divided between him and such other person. *Held*, that such partner must account for the profits of the resale. Mathewson *v.* Allen, 10 R. I. 156.

(*g*) See McLure *v.* Ripley, 2 Macn. & G. 274; Reilly *v.* Walsh, 11 Ir. Eq. 22.

(*h*) Turn. & R. 524.

(*i*) See Dale *v.* Hamilton, 2 Ph. 276.

(*k*) *Infra*, ch. 10, § 3.

4. Each must do his duty.—In an action against a partnership, if process be served on one partner, and judgment recovered, and execution levied on the partnership property, it is the duty of such partner to give notice of it to his copartners, and a neglect to do so subjects him to an action. Devall *v.* Burbridge, 6 Watts & S. (Pa.) 529.

Principle of good faith the basis of the internal law of partnership.—The foregoing general principles may be regarded as the basis of the law of partnership, so far as it relates to the rights and obligations of partners as between themselves, and they will be found to be more or less illustrated throughout the whole of the present book. Those cases, however, which more especially relate to the obligation of partners not to benefit themselves at the expense of their copartners and to the rights of majorities, require to be specially noticed.[5]

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*SECTION II.—OF THE OBLIGATION OF PARTNERS NOT TO BENEFIT THEMSELVES AT THE EXPENSE OF THEIR COPARTNERS. [*305

No partner allowed to benefit himself at the expense of the firm.—Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound, in all transactions affecting the partnership, to do his best for the common body, and

One partner is not entitled to compensation from the partnership for his services in attending to the partnership affairs, unless there is a contract therefor, express or implied. Gaston *v.* Kellogg (Mo.), 3 S. W. Rep. 589.

In Whittle *v.* M'Farlane (1 Knapp 311) the Master of the Rolls (Sir John Leach) said: "It is impossible to maintain the charge for commission, because it is in truth a charge by a partner for the collection of a partnership debt. How can a partner charge commission against a partner for the collection of a partnership debt, in which both of them are interested? It is a misapprehension entirely, and there does not appear any pretence for saying that there is any local usage in the island to sanction such a charge. If commission cannot be charged, of course interest upon commission cannot be charged. The court will, therefore, refer it back to the court below, with a declaration that no commission could be charged, either for the collection of the debts of first or second partnership."

5. Principle of good faith the basis of the internal law of partnership.—In determining the respective rights of partners in a firm, it is proper to consider, not only their original agreement, but also the manner in which the books of the firm were kept. Alterations or constructions made or put on their partnership transactions, and acquiesced in by all of them for many years, should have great weight in ascertaining the equities between them. Southmayd's Appeal (Pa.), 8 Atl. Rep. 72.

to share with his copartners any benefit which he may have been able to obtain from other people, and in which the firm is in honor and conscience entitled to participate. *Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit.* (*l*)

There are two modes in which, more especially, partners attempt unfairly to acquire gain at the expense of their copartners, viz.: first, by directly making a profit out of them; and, second, by appropriating to themselves benefits which they ought to have acquired, if at all, for the common advantage of the firm.[6] It will be convenient to advert to each of these modes in turn.

(*l*) Dig. XVII., tit. 2, *pro socio*, l. 65, § 5.

6. No partner allowed to benefit himself at expense of firm.—A general rule of partnership law requires that each partner shall devote his time, labor and skill to the benefit of the firm, and not of himself, and that he shall not purchase for his own use articles in which the firm necessarily deals. If he does so, it is at the risk of having the articles so purchased, and the profits arising therefrom, claimed by the firm as belonging to it. American Bank Note Co. *v.* Edson, 56 Barb. (N. Y.) 84; S. C., 1 Lans. 388. To the same general effect, see Anderson *v.* Whitlock, 2 Bush (Ky.) 398; Bart's Appeal, 70 Pa. St. 301; Coursen's Appeal, 79 Pa. St. 220; Eason *v.* Cherry, 6 Jones (N. C.) Eq. 261; Gray *v.* Portland Bank, 3 Mass. 364; Herrick *v.* Ames, 8 Bosw. (N. Y.) 115; Lane *v.* Carpenter, 30 Ind. 284; Lockwood *v.* Beckwith, 6 Mich. 168; Lowry *v.* Cobb, 9 La. Ann. 592; Scruggs *v.* Russell, McCahon (U. S.) 39; Solomon *v.* Solomon, 2 Ga. 18; Stoughton *v.* Lynch, 1 Johns. (N. Y.) Ch. 467; S. C., 2 Id. 209; Todd *v.* Rafferty, 3 Stew. (N. J.) 254.

One partner cannot purchase an outstanding note of the firm and enforce the same against it. Easton *v.* Strother, 51 Iowa 506. But the purchase with his own funds, by one partner, outside of the firm business, of a judgment against his copartner, is not improper, and the collection thereof may be enforced by levy and sale of the interest of the judgment debtor in the firm assets. McKenzie *v.* Dickinson, 43 Cal. 119.

A judgment upon a warrant of attorney, given to one member of a partnership to secure a debt due the partnership, will be held by him as trustee for the benefit of the firm, and payment of the judgment will satisfy the partnership debt. Chapin *v.* Clemitson, 1 Barb. (N. Y.) 311.

If one partner purchase land to his own use with money taken out of the joint fund, the lands will not be joint stock. Goodwin *v.* Richardson, 11 Mass. 469; Pitts *v.* Waugh, 4 Id. 424. *Contra*, Kayser *v.* Mangham, 8 Colo. 339.

Commercial partners who have come into possession of property belonging to the minor heir of a former partner, have no legal right to administer it for the benefit of the minor, and if they do, they become bound *in solido* for the property. Fitz *v.* Reichard, 20 La. Ann. 549.

If a member of a partnership enters into a transaction in his own behalf,

1. *Deriving profit from dealings with the firm—sale to firm.*—In the first place, then, it may be laid down as a general rule that one partner is not allowed to derive profit, at the expense of the firm,

which is within the scope of the partnership business, his copartner may claim the benefits resulting from it; this right belongs to the partner alone; third parties cannot avail themselves of it, when no such claim has been asserted, to fix a liability on the partnership. Lockwood *v.* Beckwith, 6 Mich. 168.

Where one partner expends the partnership funds in the purchase of property in his own name, he will hold the same in trust for the partnership. Evans *v.* Gibson, 29 Mo. 223; Smith *v.* Ramsey, 6 Ill. (1 Gilm.) 373; Coder *v.* Huling, 27 Pa. St. 84; Keeley *v.* Greenleaf, 3 Story (U. S.) 93; Croughton *v.* Forrest, 17 Miss. 131.

Where one of three partners refuses to pay over a sum of money claimed by each of the others, he cannot resist the payment of interest thereon, if it appears that, pending the adjustment of the claim, he had used the money for his own purposes. Coddington *v.* Idell, 3 Stew. (N. J.) 540.

If two persons agree to divide the profits of a certain transaction, it is fraud for one to receive any commissions thereon from third parties, apart from joint profits. Dunlop *v.* Richards, 2 E. D. Smith (N. Y.) 181.

An actual breach of the articles by one partner may sometimes be affirmed by the others, who may demand an accounting and share in the benefits derived from such breach. Moritz *v.* Phelps, 4 E. D. Smith (N. Y.) 135.

In order to raise an implied trust in favor of the partnership by a joint purchase of real property, the purchase must have been made at the time with partnership funds, or on partnership responsibility. The payment, incidentally, out of those funds, of an instalment due upon an antecedent contract on individual responsibility, does not raise such a trust, or give title to anything but reimbursement. Wheatly *v.* Calhoun, 12 Leigh (Va.) 264.

One partner will not be allowed to stipulate, clandestinely, for a private advantage or benefit to himself, to the exclusion of his partners, in matters in which he has been dealing on behalf of the firm. And though the articles allow a dissolution at the will of either partner, yet a partner will not be allowed, in equity, to dissolve the firm for the purpose of securing to himself an advantage which he has gained in such dealing; but the other partners may enforce a right to participate in the benefit on contributing to the expense. McMahon *v.* McCleman, 10 W. Va. 419.

Where one partner, by a secret transaction within the scope of the business of the firm, obtains a private benefit to the injury of the firm, he will be compelled to account therefor. Tolan *v.* Carr, 19 N. Y. Week. Dig. 484.

One partner cannot claim a share in the fees received by the other as administrator, merely because the other is shown to have intended to share such fees with him. King *v.* Whiton, 15 Wis. 684.

Illustrations.—Where a firm whose business was "a general produce business, held a mortgage on real estate, which real estate itself the firm was desirous to purchase under the mortgage, and entrusted the subject generally to one of the firm—*Held*, that the legal ob-

from any dealings between him and the partnership, unless it is clearly agreed that he is to have such profit. For example, if a partner is buying or selling for a firm, he cannot sell to it or buy from it at a profit to himself.

ligation of the partner entrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit with a third person, without the knowledge of his partners, by which such third person should buy the estate, giving him, the entrusted partner, an interest in it; and if the mortgage debt was fully paid into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; or, *at least*, that no other partner could recover from him a share of profits made by a sale of the real estate; all partners alike having been originally engaged in a scheme to get the real estate by depreciating its value; by entering a judgment for a large nominal amount and by deceiving or "bluffing off" other creditors. Wheeler *v.* Sage, 1 Wall. (U. S.) 518.

Where S., having the exclusive right, by previous written agreement with the owner of a certain piece of land, to purchase the same, entered into a parol agreement with T. and B., in pursuance of which B. furnished the purchase money for the land, T. gave his notes therefor to B., and the deed, by consent of the parties, was executed by the owner to B. as a security for the repayment of the purchase money to B., and the land was purchased by S., T. and B. on speculation, and for the purpose of sale and profits only, and not for permanent use; and, after the payment of the purchase money and of the costs and expenses out of the proceeds of the sale, the profits were to be divided between the partners, S., T. and B., as follows: S. was to have four-tenths, T. three-tenths and B. three-tenths; and, after a portion of the land was sold, and the purchase money and costs and expenses paid, T. and B. terminated the copartnership, refused to sell any more land, and refused to permit S. to have any further connection therewith—*Held*, that when the deed was executed to B. he held the property in trust for the copartnership; and, afterwards, when the copartnership was terminated, he held it in trust for the individual members of the copartnership, S. being entitled to four-tenths thereof. Tenney *v.* Simpson (Kan.), 15 Pac. Rep. 187.

The plaintiff and defendant, being part owners of a vessel, of which the defendant was master, and being jointly concerned in a whaling voyage undertaken by such vessel, the defendant, in the course of the voyage, landed some prisoners from a privateer, and also saved some articles from a wreck, for each of which services he received a compensation. On his return he settled up the voyage, but without rendering any account of these two items of compensation. *Held*, that the plaintiff might recover her proportion of the same in *assumpsit*. Fanning *v.* Chadwick, 3 Pick. (Mass.) 420.

Evidence that the defendant made $2100 during six months that he kept a boarding-house alone, and that the expenses were more and the receipts less than when it was kept by the plaintiff and himself together, was held not to be admissible to prove that the plaintiff was guilty of a fraud in returning a less sum

In Bentley *v.* Craven(*m*) one of the several partners was employed to purchase goods for the firm. He, unknown to his copartners, supplied them, at the market price, with goods previously bought by himself when the price was lower, and he so made a considerable profit. But it was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. The Master of the Rolls, in delivering judgment, observed: "The case is this: Four partners established a partnership for refining sugar; one of them is a wholesale grocer, and from his business is peculiarly cognizant with the variations in the sugar market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and

*306] pur*chasing the sugar for the sugar refinery is entrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having, according to his skill and knowledge, bought sugar at a time when he thought it likely to

as the profits for six months in which it was kept by them together. Thayer *v.* Barney, 12 Minn. 502.

A member of an insolvent firm, while acting as agent for the creditors, in the settlement of the partnership affairs, assisted another party to purchase from the creditors their claims, together with their rights to certain pledged assets of the firm. *Held*, that the purchase did not enure to the benefit of the firm, and that the transaction did not come within the operation of the general rule of equity, that a trustee cannot buy trust property for himself, or act as agent in buying it for another person. Westcott *v.* Tyson, 38 Pa. St. 389.

A conveyance of real estate to "J. L. S. & Co." vests the legal title in J. L. S. individually, clothed, however, with a trust for the benefit of the partnership. Moreau *v.* Saffarans, 3 Sneed (Tenn.) 595.

Where a partnership was formed by two individuals for the purpose of cutting and conveying to market pine timber, and all the pine timber upon certain lots of land was purchased, in the name of one member of the firm, for the benefit of the firm, and paid for from the property of the firm, and the contract contained a provision that the timber should be cut and taken from the land by a time specified, which was not done, but the owner of the land did not insist upon any forfeiture, but subsequently conveyed the land, for the mere price of the land exclusive of the timber, to the member of the firm with whom the original contract was made, it was held that the timber remaining upon the land still continued the property of the firm and that the avails of timber subsequently cut upon the land by the one who made the purchase, exclusive of expenses, must be accounted for by him as firm assets. Washburn *v.* Washburn, 23 Vt. 577.

(*m*) 18 Beav. 75.

rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm without letting the partners know that it was his sugar that was sold." Being the agent for the firm for buying sugars, he sold his own sugars to the firm, and made a profit, and the firm was held entitled to that profit accordingly.[7]

Purchase from firm.—In Dunne *v.* English (*n*) the plaintiff and the defendant had agreed to buy a mine for £50,000, with a view to resell it at a profit. It was ultimately arranged that the defendant should sell it to certain persons for £60,000, and that the profit of £10,000 should be equally divided between the plaintiff and the defendant. The defendant, however, in fact sold the mine for much more than £60,000 to a company in which he himself had a large interest. The plaintiff was held entitled to one-half of the whole profit made by the resale.[8]

7. Deriving profits from dealings with the firm—sale to firm.—The rule permitting one partner to sell the firm property and give a good title to a stranger, does not empower him to sell to himself. Such a sale is simply void, no right or interest passing; both the legal and equitable title remaining as before. Comstock *v.* Buchanan, 57 Barb. (N. Y.) 127; Nelson *v.* Hayner, 66 Ill. 487.

A property owner may form an association or partnership with others and sell the property to them at any agreed price, without giving rise to any confidential relation or necessitating any account of profits realized on such sale, provided there be no fraudulent representations made at the time. Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; S. C. 9 Am. L. Reg. (N. S.) 96.

In Burton *v.* Wookey (6 Madd. 367) Sir John Leach, the Vice Chancellor, said: "It is a maxim of the courts of equity that a person who stands in the relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in relation of trust or confidence towards the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis calaminaris*, he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealings in store goods; and as this profit belonged to him individually, and as the saving by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the plaintiff. I must therefore decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the defendant."

(*n*) 18 Eq. 524.

8. Purchase from the firm.—In Cali-

Full disclosure necessary.—There was in this case some evidence that the plaintiff knew that the defendant had some interest in the purchase beyond his share of the known profit of £10,000; but the plaintiff did not know what that interest was, and the real truth was concealed from him. It was held that the defendant being the plaintiff's partner, and expressly entrusted with the conduct of the sale, was bound fully to disclose the real facts to the plaintiff, and not having done so, could not exclude him from his share of the profits which the defendant realized by the sale.(*o*)[9]

Authority to sell at a given price no waiver of share of higher price.—This case also shows, what indeed is obvious enough without authority, that one partner who authorizes another to sell partnership property at a given price does not thereby deprive

fornia, one partner may purchase, on his own account, at a public sale, the interest of his copartner in real estate, and will hold the purchased property as a stranger might. Bradbury *v.* Barnes, 19 Cal. 120. But in Kentucky, on a sale of partnership land, under an execution against the firm, one partner cannot, by purchasing at such sale, extinguish the title of the other partner. Farmer *v.* Samuels, 4 Litt. (Ky.) 187. But, see, Baird *v.* Baird, 1 Dev. & B. (N. C.) Eq. 524.

If a partnership, upon its dissolution, convey all its effects to one of the firm, and, after such dissolution and transfer, a debtor of the firm promise to pay the individual partner, he may maintain an action in his own name on the promise. Howell *v.* Reynolds, 12 Ala. 128.

A and B being partners, A, under a power of attorney from B, executed a bond for a partnership debt, with warrant of attorney to confess judgment. B afterwards sold land bound by the judgment, and, upon a subsequent dissolution of the partnership, funds were deposited in the hands of A, for payment of the partnership debts, and especially of the bond aforesaid. Judgment was subsequently entered upon the bond, and the land sold by B having been sold upon an execution upon the judgment, A became the purchaser. *Held*, that his purchase must be presumed to have been made with the partnership funds, and that it would enure to the benefit of B's grantee. Swift *v.* Dean, 6 Johns. (N. Y.) 522.

(*o*) See, also, Imp. Merc. Credit Assoc. *v.* Coleman, L. R., 6 H. L. 189.

9. Full disclosure necessary.—Persons who have formed, or are dealing in contemplation of forming, an association, stand in a fiduciary relation to each other and to all who may subsequently become members. They cannot purchase property and sell it to the company at an enhanced price, without a full disclosure of all the facts, without being liable to be called to account for the profits. Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; S. C., 9 Am. L. Reg. (N. S.) 96.

The duty of one partner to communicate to his copartner information received concerning the business of the firm asserted in a case depending upon particular facts. Sexton *v.* Sexton, 9 Gratt. (Va.) 204.

himself of his right to share a higher price if a higher price should be realized.(*p*)

*2. *Obtaining benefits which in honor belong to the firm.* —The same principles apply to attempts made by partners [*307 to secure for themselves benefits which it was their duty to obtain, if at all, for the firm to which they belong.(*q*)

Thus, in Carter *v.* Horne,(*r*) the plaintiff and the defendant agreed for the purchase of an estate in moieties between them. The estate was subject to several encumbrances, which were to be discharged out of the purchase money. The defendant had abatements made to him by some of the encumbrancers of several sums due for interest and otherwise, which they, in consideration of services and friendship, agreed should be to his own use. However, on a bill brought against him by his copurchaser for an account of the rents and profits, the court would not allow the defendant the exclusive benefit of these abatements, but held that he must account for them, the purchase being made for the equal benefit of both parties, and on a mutual trust between them.10

(*p*) See, also, Parker *v.* McKenna, 10 Ch. 96, and De Busche *v.* Alt, 8 Ch. D. 286; and see Id., p. 317, as to a custom authorizing such a practice.

(*q*) Parker *v.* Hills, 5 Jur. (N. S.) 809, is not opposed to these cases, for there the money was paid for a lease which was held to belong to one partner only.

(*r*) 1 Eq. Ab. 7. See, also, De Busche *v.* Alt, 8 Ch. D. 286; Morison *v.* Thompson, L. R., 9 Q. B. 480, as to the right of a principal to profits made by his agent or subagent. Compare Great Western Insur. Co. *v.* Cunliffe, 9 Ch. 525, and Baring *v.* Stanton, 3 Ch. D. 502, where the agent's profits were part of his remuneration.

10. **Obtaining benefits which in honor belong to firm.**—A partner cannot prefer his own interest to the firm's, nor deprive it of a profitable bargain by taking it for himself; and if he clandestinely stipulate for a private benefit, he will be compelled to share it with his associates. But from this rule a partner may be excluded by his own inequitable conduct. Lowry *v.* Cobb, 9 La. Ann. 592.

Where one of a copartnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his copartners. Eason *v.* Cherry, 6 Jones (N. C.) Eq. 261.

One of two partners engaged in the manufacture and sale of a patented article cannot take an assignment from a third person of a right or claim as inventor of such patented article, and set it up against his partner; especially if he formed the partnership with knowledge of such alleged title. Kinsman *v.* Parkhurst, 18 How. (U. S.) 289.

Where it is agreed that the firm shall have a joint right in certain inventions,

Renewing leases—clandestine renewal.—It has been decided more than once that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal

the partner to whom a patent for one of such inventions is issued cannot claim the exclusive benefit thereof. Burr *v.* De La Vergne, 102 N. Y. 415.

One partner who buys in a paramount or outstanding title to lands belonging to the firm, does so in behalf of all, and the other partners, on contributing to the price, are entitled to the benefit of the purchase. Forrer *v.* Forrer, 29 Gratt. (Va.) 134.

A purchase by one partner of property hired by the partnership, enures to the benefit of all, on payment of their shares of the purchase money. Laffan *v.* Naglee, 9 Cal. 662.

The purchase of goods by one partner upon his individual credit, but for the firm's benefit, which fact he conceals, vests a valid title in the firm, and the sellers are not thereby defrauded or injured. McNair *v.* Rewey, 62 Wis. 167.

Land will not be deemed to have been acquired by one partner in trust for the firm against his own intention and the understanding of the other partners at the time. Blachley *v.* Coles, 6 Colo. 349.

Profits made by a partner in the purchase and sale of merchandise, in which his copartners are entitled to share, give them no privilege. Shropshire *v.* Russell, 2 La. Ann. 961.

The rights of a firm under a mortgage held by the firm are not affected by the purchase of the equity of redemption by one of the partners for himself. Gordon *v.* Tyler, 53 Mich. 629.

One partner who obtains the exclusive use of a right in which the firm is interested, will be held in law to hold such use in trust for the firm. Weston *v.* Ketcham, 39 N. Y. Super. Ct. 54.

Where a bill is filed by a partner against his copartner for an account, and one of the partners is appointed receiver, and uses the money received as such by him, on which he makes a profit, the other partner is not entitled to a share of such profits, the money not being held as partner, but as receiver. Whitesides *v.* Lafferty, 3 Humph. (Tenn.) 150.

If one partner occupy alone a house belonging to the copartnership, he will be liable to the firm for rent on account of it, although there was no special agreement to that effect, and no charge was made against him on the books of the firm during his lifetime. Holden *v.* Peace, 4 Ired. (N. C.) Eq. 223. See, also, Stoughton *v.* Lynch, 2 Johns. (N. Y.) Ch. 209.

Illustrations.—Where one partner represented to the others that he had purchased the interest of a deceased partner, thereby preventing its purchase by them, and afterwards bought such interest, it was held that it should enure to their benefit as well as to his own. Warren *v.* Schainwald, 62 Cal. 56.

Insurance against fire effected by one partner, in the firm name, upon property of the firm, the premium being paid from funds of the firm, will be for the benefit of the firm, whatever the intentions of the member effecting the insurance may have been, notwithstanding the fact that he charged such premium to himself. If he receives the money from the insurance company he must account to the other partner for his share of it. Tebbetts *v.* Dearborn, 74 Me. 392.

One partner purchased from an em-

of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his copartners have no interest. This was laid down and acted on by Sir William Grant in the celebrated case of Featherstonhaugh *v.* Fenwick,(*s*) where two partners having obtained, in their own names, a renewal of the lease of the partnership premises, immediately dissolved the partnership and sought to exclude the plaintiff, their copartner, from all interest in the new lease; but, in taking the accounts of the partnership, the new lease was held to be part of the assets of the firm.

Clegg *v.* Fishwick(*t*) is another case to the same effect. *There
*308] the plaintiff was the administratrix of one of several partners in a coal mine, and she filed a bill, some years after the death of the deceased, against the surviving partners, for an account and a dissolution, and for a declaration that a renewed lease, which had been obtained by the defendants, might be declared subject in equity to a trust for the benefit of the partnership. A twofold defence was set up, viz., first, that the old partnership ended with the old lease, and that the plaintiff could not therefore claim any interest in the new lease; and secondly, that she had, some time before the filing of the bill, assigned all the share of

ployee of the firm a patent right in an article of use and value to the firm, and, without disclosing or being requested to disclose the terms of the purchase, offered to sell it to the firm at an advanced price, but the firm refused to buy, preferring to use the article on a royalty basis. *Held*, that under the circumstances the firm could not insist, after dissolution, that the purchase should be considered as having been made for its benefit. American Bank Note Co. *v.* Edson, 56 Barb. (N. Y.) 84; S. C., 1 Lans. 588.

A and B, owning land in partnership, agreed to purchase an outstanding title; A purchased and paid for it, and took the conveyance to himself; B, having then done, or advanced for the firm, more than his share, refusing to pay anything—*Held*, that the title taken by A was taken for the partnership; and that B's refusal to pay a part of the purchase money did not deprive him of the right of having the benefit of the purchase, nor was it evidence of a dissolution of the partnership. Eakin *v.* Shumaker, 12 Tex. 51.

(*s*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298. In such cases the other partners cannot restrain the landlord from granting the lease to the one partner only. Their remedy is to treat the lessee as a trustee for the firm. Alder *v.* Fouracre, 3 Swanst. 489.

(*t*) 1 Macn. & G. 294. See, too, Clements *v.* Hall, 2 De G. & J. 173, and 24 Beav 333.

the deceased to his children, and that she, therefore, at any rate, had no right to institute proceedings respecting such share. It was, however, decided, first, that the old lease was the foundation for the new one, and that parties interested jointly with others in a lease could not take the benefit of a renewal to the exclusion of those others; and secondly, that what had been assigned by the plaintiff was the share of the deceased in the partnership, which share had never been ascertained, and that the effect of the assignment was merely to constitute her a trustee of the share for the assignees after she had got it in, and not to deprive her of her power to call for a realization of the partnership property.

Open renewal.—In both of these cases the renewal of the lease was clandestine. But that is not an essential feature. In the more recent and very important case of Clegg *v.* Edmondson, (*u*) the partnership was at will; the managing partners gave notice of dissolution and of their intention to renew the old lease for their own benefit. They afterwards did so, the other partners protesting, and there was evidence to show that the landlord objected to renew to any persons except the managing partners. (*x*) It was held, however, that it was not competent for the managing partners thus to acquire for themselves alone the benefit of the renewed lease. (*y*)

Right to reject renewed lease.—A partner, by renewing a lease against the will of his co*partners, cannot force it on them and compel them to treat the property comprised in it as [*309 acquired for the firm, unless there is some agreement binding them so to do. (*z*) [11]

(*u*) 8 De G., M. & G. 787.

(*x*) See, as to this, Fitzgibbon *v.* Scanlan, 1 Dow 269.

(*y*) At the same time relief against them was refused on the ground of laches and delay on the part of the plaintiffs. On this point the case will be noticed hereafter. See book III., ch. 10, § 3.

(*z*) Clements *v.* Norris, 8 Ch. D. 129. where an attempt of this sort was defeated.

11. Renewing leases.—A partner will, in respect of a renewed lease, be held to stand as a trustee for the firm, where he would not be so deemed in respect of a purchase of the reversion. Anderson *v.* Lemon, 4 Sandf. (N. Y.) 552.

Where one partner, after the dissolution of the firm, and prior to the expiration of the lease held by it, which contained no provision for renewal, obtains a renewal of the same without the consent of his copartner, he must account to the latter for the value of the expec-

Benefits derived from use of partnership property.—The principle which precludes a partner from retaining for himself benefits which he ought to share with his copartners, is applied to cases in which

tancy of renewal which pertained to the old lease. Johnson's Appeal (Pa.), 8 Atl. Rep. 36.

Where a lease, taken by a member of a copartnership, is not taken by him expressly for the firm, but demises the premises to him individually, it does not belong to the partnership; and parol evidence that it was executed for the benefit of the partnership is inadmissible. Otis *v.* Sill, 8 Barb. (N. Y.) 102.

Where one partner is negotiating to buy for the firm real estate, of which the firm has a lease for years, and the other partner secretly purchases it for himself, he will be held to hold the land in trust for the firm. Anderson *v.* Lemon, 8 N. Y. 236.

The fact that the landlord would not have granted the new lease to the other partners or to the firm, is immaterial. Mitchell *v.* Reed, 61 N. Y. 123. See, also, generally, Chamberlain *v.* Chamberlain, 44 N. Y. Super. Ct. 116.

Lord Eldon, in Featherstonhaugh *v.* Fenwick (17 Ves. 311), said: "It is clear that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained. Consider what an unreasonable advantage one partner would, upon a different principle, obtain over the rest. In this respect there can be no distinction whether the partnership is for a definite or indefinite period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners: 'The premises on which we carried on our trade have become mine exclusively, and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on the trade here.' Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given; nor had the plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal to the partnership arose solely from the indisposition of Mr. Wilkinson to any connection with the plaintiff; as before any objection had been made, on that or any other ground, the defendant goes with the intention and for the direct purpose of obtaining a renewal for himself and his son exclusively. He makes the application to Murray, who says the proposal was for a renewal for the benefit of the defendants; expressly excluding the plaintiff, with whom it was represented that George Fenwick was determined to have no further connection in trade; and, though it may be true that Wilkinson afterwards said he would not have granted a lease to the defendants jointly with the plaintiff, that declaration had become quite unnecessary by the resolution, previously expressed by the defendant, not to take a lease jointly with him. This clandestine conduct was very unfair towards the plaintiff. The defendants had not intimated to him that they would not have any

unfairness and misconduct are by no means so apparent as in those just cited. A high standard of honor requires that no partner shall derive any exclusive advantage by the employment of the partnership property, or by engaging in transactions in rivalry with the firm.

Profits of tally shop.—Thus, in Burton *v.* Wookey, (*a*) the plaintiff and the defendant were partners as dealers in *lapis calaminaris.* The defendant, who was a shopkeeper, lived near the mines in which the ore was got, and he purchased it of the miners. Instead, however, of paying them with money, he paid them with shop goods, and in his account with the plaintiff charged him as for cash paid to the amount of the *selling* price of the goods. The plaintiff contended that the price of the ore ought, as between himself and the defendant, to be considered as being the *cost* price of the goods given in exchange for it, and that the profit made by the exchange ought to be accounted for to the partnership. The court adopted this view, holding that it was the duty of the defendant to buy the ore at the lowest possible price, and to charge the partnership with no more than he actually gave for the goods bartered for the ore. An account of the profit made by the defendant in his barter of the goods was decreed accordingly.

Part owners of ships.—Again, in Gardner *v.* McCutcheon, (*b*) a ship, of which the plaintiffs and the defendant were part owners and

further connection with him, and that they intended to apply for a lease on their own account. They ought first to have given him notice, and to have placed him on equal terms with them; and then, if Mr. Wilkinson had thought proper to give them the preference, the case might admit of a different consideration. Instead of that, they clandestinely obtained an advantage, which would enable them to dissolve the partnership on terms very unfavorable to the plaintiff; and they evidently had that object in view. If they can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away, and seek some place in which to put it, as to the defendants, who were to continue it in the place where the trade was already established; and if the stock was sold, the same circumstances would give them an advantage over other bidders. In effect they would have secured the good will of the trade to themselves, in exclusion of their partner."

(*a*) 6 Madd. 367.

(*b*) 4 Beav. 534. See, too, Benson *v.* Heathorn, 1 You. & C. C. C. 326, and 2 Coll. 309; Miller *v.* Mackay, 31 Beav. 77; Shallcross *v.* Oldham, 2 Johns. & H. 609; and, as to commissions, Holden *v.*

the defendant was master, was employed for the common benefit of all in *trading and carrying under charter. The defendant, during the time the ship was thus employed, traded on his own account and made considerable profit. It was held that he was bound to account for the profits thus obtained. He was bound to trade to the best of his ability for the joint interest of himself and co-owners; he had no right to employ the partnership property in a private speculation for his own benefit; and although he alleged that the profits were made solely by the employment of his own private capital, and that by custom masters of ships were allowed to trade for their own benefit, the court declined to recognize any such custom, and considered that the profits had been made by the employment of what was not the defendant's exclusively, and that the plaintiffs had therefore a right to share them.

*310]

Benefits resulting from connection with the firm.—A partner, moreover, is not allowed, in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labor for himself to their detriment; and if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretence that it arose from a separate transaction with which the firm had nothing to do. This is well exemplified by the cases as to renewed leases which have been already referred to,(*c*) and by Russell *v.* Austwick, which also shows that the same principles apply wherever there is an agreement to share profits.

Carriers not partners inter se.—In Russell *v.* Austwick(*d*) several persons agreed to carry on business as carriers between London and Falmouth, *but they expressly stipulated that no partnership*

Webber, 29 Beav. 117. Compare Miller *v.* Mackay, 34 Beav. 295, where the profits were held to belong to him who made them. In Moffatt *v.* Farquharson, 2 Bro. C. C. 338, a part owner of a ship was held to be exclusively entitled to money paid him for his vote in the appointment of a master. But, see, on that case, the note to it in Mr. Belt's edition. See *infra*, ch. 4, § 1.

(*c*) *Ante* p. *307.

(*d*) 1 Sim. 52. See, also, as to benefits derived by one co-owner of a mine from the use of a shaft situate in his own land, but used for the mine, Clegg *v.* Clegg, 3 Giff. 322.

should subsist between them, and that each should have a certain portion of the road over which he was to carry. Business was commenced and carried on by the parties to this agreement under the name of Messrs. Russell & Co., and they were employed to carry bullion from Falmouth and Plymouth to London. On the *issue of a new silver coinage by the Bank of England, Austwick, who appears to have been the London agent of [*311 the carriers, entered into a contract with the master of the mint for the carriage of the new coin to towns on the road between London and Falmouth. Shortly afterwards he entered into another contract with the master of the mint for the conveyance of more new coin to towns in Middlesex and the adjoining counties. None of these last towns lay on the road leading from London to Falmouth, and many of them were only accessible by cross country roads, and in consequence of the increased risk of carriage along these roads, the mint authorities agreed to pay 7*s.* 6*d.* per cent. *for all the coin sent from the mint*, instead of 5*s.* per cent., which was the remuneration agreed on in the first contract. Austwick contended that he was entitled to the whole benefit of this second contract, because (except as to the extra 2*s.* 6*d.*) it had nothing to do with the carrying business between London and Falmouth; and because, as to the 2*s.* 6*d.*, that sum, although calculated on all the coin carried, whether under the first or the second agreement, was in fact paid by the mint in consideration only of the extra risk attending the carriage to the towns specified in the second contract. On the other hand, it was contended and held that the second agreement ought to be considered as made on account of all the persons interested in the first agreement; because, although the common concern had no connection with the provincial roads which were the occasion of the second agreement, yet this agreement was entered into by the officers of the mint as connected with, and a continuation of, the first agreement, and in confidence of the responsibility of the parties to it.

This case of Russell *v.* Austwick shows how difficult it is for a partner to benefit himself exclusively by dealings which in honor he ought not to have engaged in except for the common benefit of the firm.

Distinct businesses.—Lock *v.* Lynam, which came before the Court of Chancery in Ireland, affords another instructive example of the application of the same wholesome doctrine. In this case (*e*) *312] the plaintiff *and the defendant had agreed to share the profit and loss arising from contracts taken by the defendant for the supply of meat and bread to her majesty's forces in Ireland. Whilst this agreement was in force, the defendant entered into secret agreements with other persons to share with them the profit and loss accruing in respect of similar contracts entered into and taken by them. The plaintiff claimed a share in the profits made by the defendant under these secret agreements, whilst the defendant contended that he was entitled to retain them for his own exclusive benefit. The Lord Chancellor observed that in all cases of this kind the real question was whether, from the nature of the transaction between the partners, there was any express or implied contract against other dealings of a like character; and that although there was no engagement not to enter into any other partnership of the same kind, still it never could have been in the contemplation of either of the parties that one partner should, in his own name or in that of any other person, adopt contracts to the prejudice of the other's interest. A decree was accordingly made directing an inquiry whether, during the period for which any partnership between the plaintiff and the defendant existed, the defendant, either alone or jointly with any other person or persons, separately from the plaintiff, entered into or was beneficially interested in any other contract or dealing of the like nature with those in which the plaintiff and the defendant were engaged as partners. [12]

(*e*) Lock *v.* Lynam, 4 Ir. Ch. 188. Compare this and the last case with Miller *v.* Mackay, 34 Beav. 295; and see Somerville *v.* Mackay, 18 Ves. 382.

12. Carrying on distinct business. —Beyond the line of the trade or business in which a firm is engaged, an individual member of the firm may traffic on his own account. Wheeler *v.* Sage, 1 Wall. (U. S.) 518.

Where one of several partners ships goods to another partner residing in a different country, in the ordinary course of the partnership business, the presumption is that such shipment is made on joint account, in the absence of conclusive evidence that it was made on the separate account of one partner. The Francis, 1 Gall. (U. S.) 618; The San José Indiano, 2 Id. 268.

A and B entered into partnership, each engaging to devote his whole time to the business. B subsequently formed another distinct partnership with C.

One partner competing with firm.—After the decisions to which attention has now been drawn, there can be little doubt that a partner cannot, either openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs.(*f*) But where a partner carries on a business not connected with or competing with that of the firm, his partners have no right to the profits he thereby makes, even if he has agreed not to carry on any separate business.(*g*)[13]

Held, that A could not claim any share in the profits of the business of B & C. Murrell *v.* Murrell, 33 La. Ann. 1233.

One partner having an individual interest adverse to that of his firm, in another firm who had dealings and open accounts with his firm, promised such other firm that certain concessions favorable to them would be made by his firm upon the settling of the accounts between the two firms. Such promise was made without the knowledge of his copartners, and was prejudicial to them. *Held*, that the promise was not binding upon the other partners, the accounts have been regularly rendered and the charges in them being the same as those against other dealers with the firm. Goodman *v.* Einstein, 51 How. (N. Y.) Pr. 9.

Where a firm, which had built up an extensive trade and acquired a great reputation as dealers in seeds, grains, plants, &c., which were sold with labels attached bearing the firm name, made an assignment for the benefit of creditors, and plaintiff purchased all of the stock, good will, &c., of such firm, and, associating with him one of the members of the firm, conducted the business at the old stand—*Held*, that plaintiff did not acquire, by such purchase, any right to restrain another of the old firm, who had formed a corporation, from conducting a similar business under his own name, which was the original firm name also. Iowa Seed Co. *v.* Dorr (Iowa), 30 N. W. Rep. 866.

(*f*) See Glassington *v.* Thwaites, 1 Sim. & S. 124; England *v.* Curling, 8 Beav. 129, in which, however, there was something more than mere rivalry.

(*g*) Dean *v.* Macdowell, 8 Ch. D. 345. An injunction might have been obtained, and perhaps damages for a breach of covenant.

13. **One partner competing with firm.**—Where, by the partnership contract, one partner understakes to superintend and manage the business, a court in equity will enjoin him from transacting the same business at another store in the same place, for his sole benefit, even though there be no express covenant in the articles restraining him from so doing. Marshall *v.* Johnson, 33 Ga. 500.

In Glassington *v.* Thwaites (1 Sim. & S. 124, 131, 133) Sir John Leach, Vice Chancellor, said: "All newspapers are to some extent rivals. The competition is more immediate between two morning papers and two evening papers; but there is necessarily some degree of rivalry between a morning and an evening paper, especially in the country. It might, therefore, have been made a question whether it would be a due act of management in the partnership concern of a morning paper to assist with its property and its labor the publication of any other

Buying share.—*Again, it has been held competent for one partner to acquire for himself the share of a copartner [*313 in the partnership business, without informing the other partners of the purchase, and without giving them an opportunity of ac-

newspaper, so as to enable the majority of the partners in that respect to bind the minority. But the question does not arise, because the plaintiff himself is to be considered as a party to the practice, before his copartners became the proprietors of the evening paper, and because there is evidence that the proprietors of other morning papers have adopted the same practice with respect to other evening papers, so as to form a sort of usage in the trade to this effect. And it is to be considered that the annual sum paid by the evening paper for the accommodation afforded to it outweighs the danger of increased competition. The true question here is whether it makes any difference that the other proprietors of the "Herald" have now become the proprietors of the evening paper; and I think it does not make a material difference. It is true that a considerable part of the expense of a newspaper is occasioned by procuring information; and if some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which parties may protect themselves by their contracts; and, accordingly, it is a common covenant in such partnership articles, that no partner shall be proprietor of any other newspaper. In the present case there is actually a covenant that the proprietors will not be concerned in any other morning paper, which by implication affords the conclusion that it was the intention of the parties that they might engage in the concern of any evening paper. Where there is no such covenant of restraint, it is clear that at law a partner in one newspaper may be a proprietor in any other newspaper; and in this case equity must follow law; and it cannot be intended that the parties meant to impose a restraint which they might have expressed, and have not expressed, and where it is plain their attention was directed to the subject. The principles of courts of equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking. But the argument here is, not that the defendants, by becoming the proprietors of the evening paper, place themselves in a situation in which they are necessarily required to betray their duty to the morning paper; but that if their interest be greater in the evening paper than in the morning paper, they are exposed to a temptation to be dishonest and to betray their duty to the morning paper. If they act honestly, it is immaterial to the morning paper whether the

quiring it.(*h*) The articles of partnership did not forbid such a purchase; nor was it any part of the business of the firm to buy the shares of its members.[14]

Partnership not yet formed.—The same obligation to act with

defendants are or not the proprietors of the evening paper. And for this reason it is that it makes no difference in the present case that the defendants have become the proprietors of the evening paper."

(*h*) Cassels *v.* Stewart, 6 App. Cas. 64.

14. **Buying share of copartner.**—One partner may sell his interest in the partnership property to his copartner; and if the sale be fair, he will take the exclusive title thereto. Reese *v.* Bradford, 13 Ala. 837.

One partner may purchase the interest of the other in a contract, provided it does not call for the joint personal services of the two. Love *v.* Van Every, 18 Mo. App. 196. Such a transfer of interest, if *bona fide*, may be made without writings or vouchers. Re Great Western Tel. Co., 5 Biss. (U. S.) 363.

One partner can assign his interest in an open account due to the firm to his copartner, and the latter may become the real party in interest, so as to maintain a suit on the account in his own name. Swails *v.* Coverdill, 17 Ind. 337; Cook *v.* Beech, 10 Humph. (Tenn.) 412. But see Horbach *v.* Huey, 4 Watts (Pa.) 455. Such a transfer of partnership effects, if made in good faith, vests the title in the transferee as his separate estate. Matter of Byrne, 7 Am. L. Reg. (N. S.) 499.

Where one partner assigns his interest in the firm to a copartner, this passes the exclusive right to use the firm's trademark, unless the assignment expressly reserves a right in the assignor to continue to use it. Blackwell *v.* Dibrell, 3 Hughes (U. S.) 151.

The joint and several note of a partnership is not extinguished by a transfer thereof to another firm composed in part of the same persons; and the latter firm may negotiate the note to third persons. Fulton *v.* Williams, 11 Cush. (Mass.) 108.

Until the firm affairs are wound up the surviving partner occupies a trust position towards the estate of the deceased partner, and a purchase by him of the latter's interest in the firm from the administrator, is liable to be set aside at the instance of the heirs-at-law, and cannot be set up as a bar to a bill for an accounting of the partnership assets and business. Kimball *v.* Lincoln, 5 Ill. App. 316.

On the question of the mental competency of a party to make a division with his copartner and cotenant, of a large personal and real estate, the degree of injustice and inequality in the division will be taken into consideration, with the proof in regard to incompetency. Doughty *v.* Doughty, 3 Halst. (N. J.) Eq. 227.

In Jefferys *v.* Smith (3 Russ. 158, 168), Sir John Copley, Master of the Rolls, said: "It is said that the assignment was colorable; that is, that it was made for the sake of securing the assignor from future liability. Suppose he made it with that view, he had a right so to protect himself from future liability. It is alleged that the assignee was not a responsible person. Let it be so; Guppy, for the purpose of securing himself, had a right to assign to a person not responsible. The only ground of objection

good faith exists between persons who have agreed to become partners; and if one of them, in negotiating for the acquisition of property for the intended firm, receives a bonus or commission, he must account for it to the firm when formed. (*i*) He cannot retain it for himself on the ground that it was paid him for personal services rendered to the vendor before any partnership existed. Having obtained the benefit, whilst negotiating for himself and his future partners, he must share such benefit with them. (*k*)

SECTION III.—OF THE POWERS OF A MAJORITY OF PARTNERS.

Disputes between partners.—In the event of a difference arising between partners, it becomes necessary to consider whether there is any method of determining which of them is to give way to the other. It is not uncommonly supposed that the minority of the partners, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot oblige the minority except within certain limits.

How to be settled.—The first point to determine is whether the partnership articles do or do not contain any express provision applicable to the matter in question; for if they do, such provision ought to be obeyed. (*l*) If they do not, then the nature of the

*314] *question at issue must be examined; for there is an important distinction between differences which relate to mat-

would be that though there was an assignment in form, there was an understanding between the parties that the assignee should be a trustee for the assignor. Here there is no pretence for such a supposition. I must hold, therefore, that at all events, the assignment, coupled with the notice, freed Guppy from future liability."

(*i*) Fawcett *v.* Whitehouse, 1 Russ. & M. 132.

(*k*) Ib. See, also, Hitchens *v.* Congreve, 1 Russ. & M. 150, and other cases of that class, relating to promoters of companies.

(*l*) As to the construction of partnership articles, see *infra*, ch. 9.

ters incidental to carrying on the legitimate business of a partnership, and differences which relate to matters with which it was never intended that the partnership should concern itself.

1. *Disputes on matters arising in ordinary course of business.*—With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the partners are equally divided, those who forbid a change must have their way; *in re communi potior est conditio prohibentis.* (*m*) Upon this principle it is that one partner cannot either engage a new or dismiss an old servant against the will of his copartner; (*n*) nor, if the lease of the partnership place of business expires, insist on renewing the lease and continuing the business at the old place. (*o*)

Power of majority in such cases.—If, however, in a case of this description, unprovided for by previous agreement, the partners are unequally divided, the minority must, the author apprehends, give way to the majority. (*p*) This is the rule applicable to companies, whether incorporated or unincorporated; (*q*) it is the rule adopted in the Indian Contract act, (*r*) and it is practically reasonable and convenient. The only alternative is to hold that if partners disagree, even as to trifling matters of detail, the minority can forbid all change, and perhaps bring the business of the firm to a dead-lock, for which the only remedy is a dissolution. At the same time the author is not aware of any clear and distinct authority in support of the proposition that even in such matters a dissentient partner must give way to his copartners. (*s*)

However, a majority cannot, against the will of the minority,

(*m*) But see, as to the employment of a ship, Abbott on Shipping (9th ed.) 82; and Id. (12th ed.) 58; and as to completing contracts already entered into, Butchart *v.* Dresser, 4 De G., M. & G. 545.

(*n*) See Donaldson *v.* Williamson, 1 Cromp. & M. 345.

(*o*) Clements *v.* Norris, 8 Ch. D. 129. N. B.—The partnership had not expired.

(*p*) See Gregory *v.* Patchett, 33 Beav. 595; Const *v.* Harris, Turn. & R. 518; Robinson *v.* Thompson, 1 Vern. 465; as to opening accounts, Morgan's Case, 1 Man. & G. 235.

(*q*) See Stevens *v.* South Devon Rail. Co., 9 Hare 326; Simpson *v.* Westminster Palace Hotel Co., 2 De G., F. & J. 141; Kent *v.* Jackson, 2 De G., M. & G. 49, and 14 Beav. 367.

(*r*) Section 253, cl. 5.

(*s*) Pollock's Dig., § 36, adopts the author's view, but apparently on his authority.

*delegate to a manager the right to sign the partnership name; (*t*) and it is doubtful whether a majority can decide where the partnership business shall be carried on when the lease of its place of business expires. (*u*)[15] [*315

All partners entitled to be heard.—A very important rule respecting the powers and votes of majorities is that a majority, to have any weight, must act and be constituted with perfect good faith; for every partner has a right to be consulted, to express his own views, and to have those views considered by his copartners. In the language of Lord Eldon, "That is the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what,

(*t*) See Beveridge *v.* Beveridge, L. R., 2 Sc. App. 183.

(*u*) See Clements *v.* Norris, 8 Ch. D. 129, but note there the firm consisted of two members only.

15. The powers of a majority.—The general rule is that in directing the business of a partnership, a majority shall govern, notwithstanding the dissent of the minority. Peacock *v.* Cummings, 5 Phila. (Pa.) 253; 46 Pa. St. 434; Campbell *v.* Bowen, 49 Ga. 417; Irvine *v.* Forbes, 11 Barb. (N. Y.) 587; Johnston *v.* Dutton, 27 Ala. 245; Kirk *v.* Hodgson, 3 Johns. (N. Y.) Ch. 400; Livingston *v.* Linch, 4 Id. 573; Waterbury *v.* Express Co., 50 Barb. (N. Y.) 157; S. C., 3 Abb. Pr. (N. S.) 163; Western Stage Co. *v.* Walker, 2 Iowa 504; Yeager *v.* Wallace, 57 Pa. St. 365.

The members of a private association, as a telegraph company, are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority cannot bind the minority, unless by special agreement. Irvine *v.* Forbes, 11 Barb. (N. Y.) 587.

Whether the acts of the majority are done in bad faith, and in willful violation of the rights of the minority, is a question for the jury under the evidence in each case. Western Stage Co. *v.* Walker, 2 Iowa 504.

A copartnership was established between four persons in order to purchase Cherokee lands, and to work them for mining, &c. One of the specifications in the articles of copartnership was that such disposition was to be "made of their property as a majority should deem advisable." Two of the partners became insolvent, and a third nearly so, and all three abandoned the work and neglected to pay the instalments of the purchase money, leaving the whole burden upon the fourth partner. *Held*, that neither of the first three partners had a right to complain in equity that the fourth partner, in order to relieve his sureties, had disposed of the land at a fair price without the concurrence of a majority, especially as to a *bona fide* purchaser, and without notice, for value, from such fourth partner; all they could ask being an account from the fourth partner. Rhea *v.* Vannoy, 1 Jones (N. C.) Eq. 283; Id. 290.

when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, 'We do not care what one partner may say; we, being the majority, will do what we please,' is, I apprehend, what a court of equity will not allow." (*x*)

Majorities at meetings.—Moreover, where powers are conferred on a majority present at a meeting of not less than a certain number of persons, unless such meeting be duly convened and the requisite number be present at the meeting, the powers in question cannot be exercised; and although it may be true that the required number of persons was summoned, and that the absentees could not have turned the scale, this will not render valid the acts of the majority of those actually present, for that is not such a majority as was originally contemplated. (*y*)

2. *Disputes on matters involving a change in the nature of the business.*—Passing now to the second class of differences, viz., those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner.

One dissentient can forbid a change.—Each partner is entitled to say to the *others, "I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, nor to hold me to any other terms, nor to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable. (*z*)

*316]

In companies as well as in partnerships.—This principle is applicable to all partnerships and companies, whether great or small,

(*x*) Const *v.* Harris, Turn. & R. 525, and see Id. 518, and Blisset *v.* Daniel, 10 Hare 493; Great Western Rail. Co. *v.* Rushout, 5 De G. & S. 310.

(*y*) See Re London and Southern Counties Freehold Land Co., 31 Ch. D. 223; Howbeach Coal Co. *v.* Teague, 5 Hurlst. & N. 151; Ex parte Morrison, De G. 539.

(*z*) Attorney-General *v.* Great Northern Rail. Co., 1 Drew. & S. 154.

and is evidently one which requires only to be stated to be at once assented to as being just. No cases upon this subject can be referred to with greater advantage than Natusch *v.* Irving and Const *v.* Harris, both of which were decided by Lord Eldon.(*a*)

Fire and life insurance company turning into a maritime insurance company.—In Natusch *v.* Irving(*b*) a company was formed, in the early part of the year 1824, for granting fire and life assurances. The capital was £5,000,000, divided into fifty thousand £100 shares. The plaintiff was one of the original subscribers, and held fifteen shares, in respect of which he had paid the required deposit, but he had not executed the company's deed of settlement. In conformity with the rules of the company, he had effected a policy with it on his life for £1500. In the summer of 1824, the act of 6 Geo. I., prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff, in answer to an inquiry whether this announcement was authorized by the directors, was informed that it was, and that if he objected to the course about to be pursued, he might receive back his deposit, with interest, and have his policy canceled and the premium returned. In reply to this, the plaintiff stated that he was ready to execute any deed which was in conformity with the prospectus; that he conceived it competent for him to insist that the business in which he was a partner should be carried *on according to the agreement which united the partners together; [*317 that he could not think his doing so would entitle the managers of that partnership to pay him out his capital and deprive him of a share in a concern of which he had the highest opinion; that he therefore required the directors to abstain from any contracts or engagements relating to marine insurance, as not being contemplated by himself and those who joined the company upon the terms of the prospectus, and that he required an undivided atten-

(*a*) See, too, Davies *v.* Hawkins, 3 Mau. & S. 488; Fennings *v.* Grenville, 1 Taunt. 241; Glassington *v.* Thwaites, 1 Sim. & S. 131.

(*b*) Gow on Partnership (3d ed.), App. 398. See, also, The Phœnix Life Insurance Co., 2 Johns. & H. 441.

tion on the part of the directors to the objects defined therein. The plaintiff afterwards attended at the office of the company to execute its deed of settlement, but finding that it contained provisions enabling the company to carry on the business of marine insurance, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the company had commenced, and it was carrying on the business of marine insurance; but there was no evidence to show acquiescence on the part of the plaintiff, and there was evidence to show continued opposition by him to the carrying on of such business. The plaintiff applied for an injunction to restrain the directors from effecting marine insurances, and an injunction was granted.(c) The judgment of Lord Eldon, as far as it relates to the power of a majority, is particularly valuable, and the following extracts from it are constantly referred to:

Answer to objection that dissentient can retire.—With respect to the liberty given to the plaintiff to retire, his lordship said: "An offer is made to the plaintiff that he may receive back his deposit, with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so as to form a new company. This would, as to partnerships, *318] be a most dangerous doctrine. *Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest, 'Take that, and we are a new company,' keeping the effects, means, assets and property

(c) The bill was filed by the plaintiff, on behalf of himself and all others the shareholders of the company, against the directors, and prayed a dissolution, and, if necessary, a receiver, and an injunction to restrain the defendants from effecting marine insurances in the name and on account of the company, and from using the name, and from applying the capital of the company for such purposes.

of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares."

Answer to argument that the change was warranted by statute.—With respect to the alteration of the law enabling companies to carry on the business proposed, his lordship observed: "The repeal of the act 6 Geo. I., which merely made it lawful for societies or partnerships, however numerous their members might be, to insure against marine risks, could not make it lawful for companies or societies, which were formed for specified purposes of insurance upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, either expressly or impliedly (where individual partners did not consent to embarking in new projects, either originally, or subsequently to the formation of the companies), created an authority in some part of the body to bind all the body to the adoption of such new undertakings."

Observations on powers of majorities.—With respect to the power of a majority, his lordship laid it down that if six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon, and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarrassments unless they were permitted to proceed in the further execution of such projects, if a court of equity would not go the length of holding that such conduct was *consent, it would scarcely think parties so conducting themselves entitled [*319 to the *festinum remedium* of injunction. * * * Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six,

must, as far as the nature of things will admit, be applied to a partnership of six hundred. * * * They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce."

Altering principle on which profits should be dealt with.—In Const *v.* Harris(*d*) the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient partner for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognized the principle that articles which had been agreed on to regulate a partnership cannot be altered without the consent of *all* the partners. (*e*)

In modern times the same principle has been constantly recognized and followed. Indeed, it is never now disputed, although its application frequently gives rise to controversy. The decisions bearing on this subject relate, however, to companies, and are not, therefore, further noticed in the present treatise. (*f*)

(*d*) Turn. & R. 496.

(*e*) See Turn. & R. 517, 523. The whole judgment is well worthy of attentive perusal; but being much to the same effect as that in Natusch *v.* Irving, the writer has not felt it necessary to make extracts from it.

(*f*) Auld *v.* Glasgow Working Men's Building Soc., 12 App. Cas. 197, is one of the most recent cases.

*320]

*CHAPTER III.

OF THE CAPITAL OF PARTNERSHIPS.

Capital of partnerships.—By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property. The capital is a sum fixed by the agreement of the partners, whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm, for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital; *e. g.*, for money advanced by him to the firm by way of loan, and not intended to be wholly risked in the business. The distinction between a partner's capital and what is due to him for advances by way of loan to the firm, is frequently very material; *e. g.*, with reference to interest—with reference to clauses in partnership articles fixing the amount of capital to be advanced and risked, and prohibiting the withdrawal of capital; and, above all, with reference to priority of payment in the event of dissolution and a deficiency of assets. (*a*) The amount of each partner's capital ought, therefore, always to be accurately stated, in order to avoid disputes on a final adjustment of account; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal. (*b*) [1]

(*a*) See, on this subject, *infra*, book III., ch. 8, § 1, on partnership accounts.

(*b*) See, as to the equality of shares, *infra*, book III., ch. 5, § 2.

1. **Capital of partnerships.**—The amount of capital furnished by each partner in a firm, and the manner of paying it in, may be proved by other evidence than the articles of copartnership. Boyers *v.* Elliott, 7 Humph. (Tenn.) 204.

A note given by a partner to his copartner, as collateral security for the capital advanced by the latter, is with-

**Increase and diminution of capital.*—When the agreed amount of capital of a partnership has been exhausted and [*321 the business cannot be carried on to a profit, the partnership may be dissolved, as will be pointed out hereafter.(c) A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk, although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm.(d) On the other hand, a partner who has agreed to furnish a certain amount of capital is bound, not only to bring it into the firm, but also to leave it in the business until the firm is dissolved.

It follows from these considerations that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership,(e) and this rule is perfectly consistent with the obvious fact that the assets and lia-

out consideration to support it. Stafford *v.* Fargo, 35 Ill. 481.

An incoming partner paid the two original members of the firm money as indicated in the receipt: "Received of E. $2000 for and in consideration of one-half interest in one safe, two desks, two pair of scales, one stove and pipe; also the undivided half of our trade and good will, and the benefit accruing therefrom; also one-half of the contract of potatoes for future delivery, and the benefits of the same, as per contract of copartnership made this date between H. E. & M." *Held*, that the money so paid belonged to the two original partners, especially if it was credited on the books, in equal amounts, to their stock account. Evans *v.* Hansen, 42 Ill. 234.

Where, in a suit for a dissolution of a partnership, it appeared that there was a mistake as to the amount of capital put in by the complainants, and it appeared that more was put in than was originally stated, but how much more was uncertain, it was held that the burden of proof was upon them, and that they should be restricted to the smallest amount proved, especially as one of the complainants was the book-keeper, and should have kept the books so as to show the true state of the affairs. Moon *v.* Story, 8 Dana (Ky.) 226.

A partnership consisting of four partners was dissolved, two assigning their shares to one of the others, and the remaining two formed a new partnership. In their articles they agreed that of the property on hand a sufficient amount should be set apart and appropriated to paying the debts of the old firm, and another amount for improvements made on real estate, and that the remainder should be deemed the capital stock of the firm. *Held*, that the amount set apart for improvements made on real estate did not make a part of the capital stock. Mathers *v.* Patterson, 33 Pa. St. 485.

(c) *Infra*, book IV., ch. 1, § 2.

(d) *Ante* p. *200.

(e) See Heslin *v.* Hay, 15 L. R., Ir. 431, where an attempt was made to violate this rule; and see the observations of Lord Bramwell in Bouch *v.* Sproule, 12 App. Cas. 405.

bilities of a partnership are necessarily liable to fluctuation, and that the value of each partner's share of such assets constantly fluctuates also.

Borrowing money and increasing capital.—The difference between borrowing money on the credit of a firm and increasing its capital has been already adverted to,(*f*) and it has been seen that although each member of an ordinary trading partnership can pledge its credit for money borrowed in order to carry on its business, he cannot render it liable to repay money borrowed by him to enable him to furnish the amount of capital which he has agreed to bring in.(*g*)

(*f*) *Ante* pp. *132, *133. (*g*) Ib.

*322] # *CHAPTER IV.

OF JOINT AND SEPARATE PROPERTY.

SECTION I.—OF JOINT ESTATE, *323.
SECTION II.—SEPARATE ESTATE, *327.
SECTION III.—CONVERSION OF JOINT ESTATE INTO SEPARATE ESTATE, AND VICE VERSA, *334.

Partnership property.—The expressions "partnership property," "partnership stock," "partnership assets," "joint stock" and "joint estate," are used indiscriminately to denote everything to which the firm, or, in other words, *all* the partners composing it, can be considered to be entitled as such. (*a*) The qualification *as such* is important, for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; *e. g.*, if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners. (*b*) Whether it does so or does not, depends upon circumstances which will be examined hereafter.

Importance of distinguishing partnership property from the separate property of the partners.—It is often a difficult matter to determine what is to be regarded as partnership property and what is to be regarded as the separate property of each partner. The question, however, is of importance, not only to the partners themselves, but also to their creditors; for, as will be seen hereafter, if a

(*a*) The expression "joint estate" sometimes has a wider signification, including all property which, on the bankruptcy of the firm, is distributable amongst its creditors. See *post* book IV., ch. 4, § 3, "Reputed Ownership."

(*b*) Morris *v.* Barrett, 3 You. & J. 384, and see the judgment in Ex parte The Fife Banking Co., 6 Ir. Eq. 197; S. C. on appeal, under the name of Re Littles, 10 Id. 275.

firm becomes bankrupt, the property of the firm and the separate property of each partner have to be distinguished from each other, it being a rule to apply the property of the firm in the first place in payment of the creditors of the firm, and to apply the separate properties of the partners in the first place to the payment of their respective separate creditors.[1]

*It is proposed, therefore, to examine the rules by which to determine what is the property of the firm, and what the separate property of its members. [*323

Question determined by agreement.—It is for the partners to determine by agreement amongst themselves what shall be the property of them all and what shall be the separate property of some one or more of them. Moreover, it is competent for them by agreement amongst themselves to convert what is the joint property of all into the separate property of some one or more of them, and *vice versa*.[2] The determination, therefore, of the question, What is and what is not the property of the firm? involves an inquiry into the three following subjects, viz.:

Joint estate.
Separate estate.
Conversion of one into the other.

Each of these will be examined in order.

SECTION I.—OF JOINT ESTATE.

1. *Property of the firm.*—Whatever, at the commencement of a partnership, is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been

1. **Partnership property distinguished from separate property.**—Where one partner furnishes all the capital and owns all the stock, the other contributing his labor and experience, and having a "working interest" only, receiving for his services a share of the net profits, the property is not firm property, and may be seized and sold for the private debt of the one who contributed it. Stumpt *v.* Boaur, 76 Ind. 157.

2. **Question determined by agreement.**—Three persons agreed to buy cattle on their separate account, the cat-

added thereto or obtained by means thereof, whether directly by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown.(*c*)[3]

Property paid for by the firm.—The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership moneys, for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone.(*d*)

*324] Upon this *principle it is held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust and signed by the partner to whom the land has been conveyed.(*e*) So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and although it may be

tle so purchased to become partnership property when all should approve of the purchase. *Held*, that until such approval neither of the three was bound for the purchases of the others. Valentine *v.* Hickle, 39 Ohio St. 19.

(*c*) See Crawshay *v.* Collins, 2 Russ. 339, as to the patents; Nerot *v.* Burnand, 4 Russ. 247, and 2 Bligh (N. S.) 415; Bone *v.* Pollard, 24 Beav. 283. See, also, as to co-owners of mines not being copartners, Clegg *v.* Clegg, 3 Giff. 322. As to outlays of partnership money on the separate property of one partner, see *infra*, § 2.

3. Property of the firm, generally.—A judgment in a suit by two for a trespass alleged to be on firm property, is firm assets. Collins *v.* Butler, 14 Cal. 223.

Where a firm engaged in the planting and selling of oysters, closes its business, one partner cannot dispose of the other's share in the planted oysters remaining in the beds after the debts are paid, without the other partner's authority. Ruckman *v.* Decker, 8 C. E. Gr. (N. J.) 283.

One of two partners cannot commit larceny or burglary as to the property or house of the firm. Alfele *v.* Wright, 17 Ohio 238.

A partner in a firm engaged in purchasing live stock on commission, died after certain commissions were partly earned. The surviving partner completed the transactions and received the money. *Held*, that such commissions should be treated as partnership assets, but that the surviving partner was entitled to have an allowance for his time and expenses in completing the transactions. Newell *v.* Humphrey, 37 Vt. 265.

(*d*) See per Lord Eldon, in Smith *v.* Smith, 5 Ves. 193; Robley *v.* Brooke, 7 Bligh 90; Morris *v.* Barrett, 3 You. & J. 384. See, also, Helmore *v.* Smith, 35 Ch. D. 436.

(*e*) Forster *v.* Hale, 5 Ves. 308, and 3 Id. 696.

contrary to the company's deed of settlement for more than one person to hold shares in it.(*f*)[4]

Ships.—As regards ships, there was often a difficulty arising from the Ship Registration acts. For as it was clearly settled that a ship belonged, both at law and in equity, to the person or persons who were registered as her owners, and to no one else, it followed that if a ship had been bought with partnership money, had been used as partnership property, and had always been treated as such by all the partners, yet if she was registered in the name of one partner only, there was no method by which that one could be prevented from effectually asserting an exclusive right to the ship and depriving his copartners of all their interest in her.(*g*) The provisions of the present Merchant Shipping acts differ, however, in several material respects from the enactments previously in force, and now, in the case above supposed, the registered partner would be deemed a trustee for the firm.(*h*)

**Cases where property paid for by the firm does not belong to it.*—Strong as is the presumption that what is [*325 bought with partnership money is partnership property, the pre-

(*f*) Ex parte Connell, 3 Deac. 201; Ex parte Hinds, 3 De G. & S. 613.

4. Property paid for by the firm.—Land purchased by one partner, in his own name, with partnership funds, will not be deemed joint estate in a court of law. Pitts *v.* Waugh, 4 Mass. 424. S. P., Goodwin *v.* Richardson, 11 Id. 475.

If a person buys goods for a firm of which he is a member, the goods bought become the property of the firm, though he does not at the time disclose the name of his partner. Scott *v.* McKinney, 98 Mass. 344.

(*g*) See Slater *v.* Willis, 1 Beav. 354; Battersby *v.* Smyth, 3 Madd. 110; Camden *v.* Anderson, 5 T. R. 709; Curtis *v.* Perry, 6 Ves. 739; Ex parte Yallop, 15 Ves. 60; Ex parte Houghton, 17 Ves. 251; and as to the old law relating to equitable interests in ships, see an article by the author in the Law Magazine for May, 1862 (vol. XIV., p. 70, N. S.) If a ship was registered in the name of two partners, the shares in which they were interested might have been shown. See Ex parte Jones, 4 Man. & S. 450. As to the right of one partner to sell or mortgage a ship belonging to the firm, see Ex parte Howden, 2 Mont., D. & D. 574.

(*h*) 17 and 18 Vict., c. 104, §§ 37, 43, and 25 and 26 Vict., c. 63, § 3. Upon the construction of the former act, see Hughes *v.* Sutherland, 7 Q. B. D. 160; Liverpool Borough Bank *v.* Turner, 1 Johns. & H. 159, and 2 De G., F. & J. 502. A ship may be registered in the name of a company, though some of its members are foreigners. See 17 and 18 Vict., c. 104, § 18; and R. *v.* Arnaud, 9 Q. B. 806.

sumption may be rebutted; *e. g.*, by showing that the money was lent by the firm to one partner, and so was not in fact partnership money when invested.(*i*) Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it, for the presumption in such a case is rather that the property in question was his contribution to the common stock.(*j*) This subject will be adverted to more at length in the next section.

Secret benefits obtained by one partner.—It has been already seen that one partner will not be allowed to retain for his own exclusive benefit any property which he may have acquired in breach of that good faith which ought to regulate the conduct of partners *inter se.* Whatever property has been so acquired will be treated as obtained for the benefit of all the partners, and as being part of the assets of the firm; and this rule applies to property obtained by a continuing or surviving partner in breach of the good faith which he is bound to exercise towards a retired partner, and the representatives of a deceased partner, so long as their interest in the partnership assets continues.(*k*)

Money paid to one partner for his exclusive benefit.—At the same time, if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or, being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. For example, where a ship, belonging to a Frenchman and two Americans, as partners, was captured by a British cruiser, and compensation was made to the Americans, but to them only, the Frenchman being expressly excluded, it was held that the sum awarded to the Americans belonged to them alone, and that the Frenchman had no interest in it.(*l*) So, if one partner is *the lessee of property to which the firm is only entitled so long as the partnership continues, and on the dissolution of the partnership the lease is sold or renewed, the

*326]

(*i*) As in Smith *v.* Smith, 5 Ves. 193. per Sir J. Cross. See, also, Walton *v.* Butler, 29 Beav. 428; Ex parte Emly, 1 Rose 64.

(*j*) See Ex parte Hare, 1 Deac. 25, 551. See, also, Burnand *v.* Rodocanachi,

(*k*) See *ante* p. *305, *et seq.*

(*l*) Campbell *v.* Mullett, 2 Swanst.

price of the sold lease, or the renewed lease, as the case may be, will belong, not to the firm, but to that partner in whom the lease is by hypothesis exclusively vested. (*m*)

Property acquired after dissolution.—As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners. This was decided in Nerot *v.* Bernand. (*n*) In that case, in effect, an hotel keeper bequeathed his business to his son and daughter. After the death of the testator, the daughter continued to carry on the business. She afterwards transferred it to a new house in Clifford street, and this house was conveyed to her in fee. She continued to carry on the business there for some time, and ultimately she married. During the greater part of the time which had elapsed since the death of the testator, his son had been abroad, and on his return he insisted that he ought to be considered as a partner with his sister, and that as such he was entitled to have the new house taken by her, and all the stock in trade and effects purchased by her in order to carry on the business, treated as partnership property. The Vice Chancellor decided that the testator's son and daughter had become partners, but that the partnership between them had been dissolved on her marriage. He also held that the new house and all the goods, furniture, plate, linen, china, wines, stock in trade, implements and other effects, being in and about the premises, formed a part of the partnership property. Upon appeal, this decision was affirmed, so far as it related to the existence and subsequent dissolution of partnership, but was varied so far as it related to what ought to be considered as partnership property. *Upon this head the Lord Chancellor's judgment was as follows: [*327

7 App. Cas. 333; Thompson *v.* Ryan, 2 Swanst. 565, *n;* Moffatt *v.* Farquharson, 2 Bro. C. C. 338. See the note on this case in Belt's edition of Brown's Reports.

(*m*) See Burdon *v.* Barkus, 3 Giff. 412; affirmed on appeal, 4 De G., F. & J. 42.

(*n*) 4 Russ. 247, and 2 Bligh (N. S.) 215. See, too, Payne *v.* Hornby, 25 Beav. 280.

"It appears to me satisfactorily made out, from all the circumstances, that the house in Clifford street was bought with the partnership property; bought, in the first instance, partly with the partnership property, partly with money borrowed by Miss Nerot and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership, and I think that part of the Vice Chancellor's decree by which he directs the house to be sold must be affirmed.

"There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The Vice Chancellor has directed all the property to be sold which was in the house in Clifford street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree existed in the house was, without inquiry, to be considered as partnership property. Lord Eldon doubted greatly whether that part of the decree could be sustained; and, in my opinion, it must be varied by directing the master to take an account of the particulars of the partnership property which were in the house in Clifford street at the time of the dissolution, and of the value of the property at that time; and to inquire whether any part of that property still remains in the house." (*o*)

Good will.—The good will of a partnership, in so far as it has a pecuniary value, is partnership property, unless the contrary can be shown. This subject, however, will be more conveniently discussed hereafter, when treating of partnership articles. (*p*)[5]

(*o*) See, also, Ex parte Morley, 8 Ch. 1026, where a surviving partner continued the business, sold the old stock in trade, and it was held that the new stock in trade formed part of his separate estate.

(*p*) See *infra*, book III., ch. 9, § 2.

5. Good will.—A transfer, by a retiring partner to the other, of "the business connections and patronage belonging to the firm," may be deemed to include the good will of the concern. Kellogg *v.* Totten, 16 Abb. (N. Y.) Pr. 35.

The subscription list of a newspaper published by more than one proprietor is firm property; and when one of the partners dies it does not survive to the surviving partner, but belongs to, or is to be administered as part of the joint estate. Holden *v.* M'Makin, 1 Pars. (Pa.) Sel. Cas. 270.

Lord Eldon, in Kennedy *v.* Lee (3 Mer. 441, 452), speaking on this subject, used the following language: "Where two persons are jointly interested in trade, and one by purchase becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit, essentially connected with the sole ownership. In the case of the trade of a nurseryman, for instance, the mere knowledge of the fact that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry

SECTION II.—SEPARATE ESTATE.

2. *Property of the individual partners.*—The preceding inquiry into what constitutes the property of the firm has rendered it unnecessary to inquire at length into what constitutes the separate property of its members. A few additional observations, pointing out the danger of relying too much on circumstances which are often regarded as decisive, may, however, be usefully added.[6]

on the same trade, with other property, not the partnership property, would not possess. In that sense, therefore, the good will of a trade follows from, and is connected with the fact of sole ownership. There is another way in which the good will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account. Now it is evident that in neither sense was the good will of this trade at all considered as among the subjects of the valuation to be made by either party. It was not so considered by the plaintiff, when he wrote his letter of the 21st of October. The words 'concern' and 'inheritance' are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And when the plaintiff offers to take the business himself, he could not have forgotten that the defendant's own estate of Butterwick lay contiguous to the partnership property, and therefore his introducing no stipulation, with reference to the fact of its contiguity, is a clear intimation that when he wrote this letter he had no intention, in offering to take the partnership property, to purchase with it the good will in the sense of restricting the defendant from carrying on the trade in its vicinity. In that sense at least, therefore, the good will of the trade was not the subject of contract, or treaty even, between the parties."

6. Property of the individual partners.—Where one partner takes out a patent in his individual name, and never assigns it to the firm, the firm can lay no claim to the patent. McWilliams Manuf. Co. *v.* Blundell, 11 Fed. Rep. 419.

A patent taken out by one partner is not firm property unless assigned to the firm, even though obtained at joint expense. McWilliams Manuf. Co. *v.* Blundell, 22 Pat. Off. Gaz. 177.

An entry in the firm books made by one of the partners in a firm which runs a saw mill, charging himself with a boat which he had built at the mill, may be introduced by him as evidence *inter alia* to prove that the boat is his individual property. Reno *v.* Crane, 2 Blackf. (Ind.) 217.

Where land belonging to one partner is used by the firm, but is not put into the actual stock, it does not become partnership property. Gordon *v.* Gordon, 49 Mich. 501.

A mortgage given by one partner to the other, to secure a balance due, is not

*328] **That which produces partnership profits may belong to one partner only.*—It by no means follows that persons who are partners by virtue of their participation in profits are entitled as such to that which produces those profits. For example, coach proprietors who horse a coach and divide the profits may each make use of horses which belong to himself alone and not to the firm of proprietors.(*q*) So, where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves, and the money arising from their sale, are the property of the merchant, and not the joint property of himself and the broker;(*r*) and it not unfrequently happens that dormant partners have no interest in anything except the profits accruing to the firm to which they belong.(*s*)[7]

Property used for partnership purposes not necessarily partnership property.—Again, it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all.(*t*) So, it sometimes happens, though less frequently, that

a partnership asset. Niagara County Bank *v.* Lord, 33 Hun (N. Y.) 557.

Where a permanent building is erected on land owned by one partner, who holds the legal title, it will be presumed to be his separate property, though used by the firm as its place of business, unless it be shown that it was built by the firm with firm assets, or contributed, by the partner who built it, to the capital stock. Goepper *v.* Kingsinger, 39 Ohio St. 429.

(*q*) As in Fromont *v.* Coupland, 2 Bing. 170; Barton *v.* Hanson, 2 Taunt. 49, and see Wilson *v.* Whitehead, 10 Mees. & W. 503, as to an author's interest in paper supplied for his work to the publisher.

(*r*) Smith *v.* Watson, 2 Barn. & C. 401; Meyer *v.* Sharp, 5 Taunt. 74; Burnell *v.* Hunt, 5 Jur. 650, Q. B.

(*s*) See Ex parte Hamper, 17 Ves. 404, 405; Ex parte Chuck, Mont. 373.

7. **That which produces partnership profits may belong to one partner only.**—If partners, by arrangement among themselves, own each a separate part of the stock in trade on which the partnership business is transacted, the stock will nevertheless be regarded as partnership property for the payment of partnership debts, at least as to creditors who have no notice that the stock is owned in that way. Elliot *v.* Stevens, 38 N. H. 311.

(*t*) See Burdon *v.* Barkus, 3 Giff. 412, affirmed on appeal, 4 De G., F. & J. 42, as to a lease of a coal mine; Ex

office furniture,(*u*) and even utensils in trade,(*x*) are the separate property of one of the partners, subject to the right of the others to use them as long as the partnership continues. If, however, a partner brings such property into the common stock as part of his capital, it becomes partner*ship property, and any increase in its value will belong to the firm.(*y*) [*329

Property bought with the money of the firm.—It does not even necessarily follow that property bought with the money of the firm is the property of the firm. For it sometimes happens that property, although paid for by the firm, has been, in fact, bought for one partner exclusively, and that he has become debtor to the firm for the purchase money.(*z*)[8]

parte Murton, 1 Mont., D. & D. 252; Balmain *v.* Shore, 9 Ves. 500; Rowley *v.* Adams, 7 Beav. 548; Doe *v.* Miles, 1 Stark. 181, and 4 Camp. 373. If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit. Doe *v.* Bluck, 8 Car. & P. 464; Benham *v.* Gray, 5 C. B. 138 (an action of trespass). As to an injunction in such cases, see Elliot *v.* Brown, 3 Swanst. 489, *n.;* Hawkins *v.* Hawkins, 4 Jur. (N. S.) 1044, Stuart., V. C.

(*u*) Ex parte Owen, 4 De G. & S. 351. See Ex parte Hare, 1 Deac. 16; Ex parte Murton, 1 Mont., D. & D. 252.

(*x*) Ex parte Smith, 3 Madd. 63.

(*y*) Robinson *v.* Ashton, 20 Eq. 25.

(*z*) See Smith *v.* Smith, 5 Ves. 193; Walton *v.* Butler, 29 Beav. 428; Ex parte Emly, 1 Rose 64. Compare the case of the Bank of England, 3 De G., F. & J. 645, noticed *infra*, p. *330.

8. **Property bought with the money of the firm.**—Equity treats real estate owned by a firm and purchased with its funds, as partnership property, for the purpose of settling the debts of the firm and distributing its effects. Allen *v.* Withrow, 110 U. S. 119.

While real property purchased with partnership funds is not necessarily partnership property, yet the fact that it was so purchased, especially if it was necessary for the ordinary operations of the firm, and was actually so used, will be conclusive in equity that it was intended to be held as partnership property, in the absence of controlling evidence to the contrary. But at law, the property must ordinarily be dealt with according to the legal title. Hoxie *v.* Carr, 1 Sumn. (U. S.) 173.

Real estate contributed to the partnership by one partner, at a valuation agreed upon, becomes firm property without a conveyance from such partner, and he holds the legal title in trust for the firm as partnership assets. Wiegand *v.* Copeland, 7 Sawy. (U. S.) 442.

Where one partner invested a portion of the partnership funds in lands for his own use, it was held that this created a resulting trust, and that the other partners might follow it and claim their portion of the specific property. King *v.* Hamilton, 16 Ill. 190. See, also, Edgar *v.* Donnally, 2 Munf. (Va.) 387.

Real property, bought for partnership purposes, and paid for with the undi-

Agreement of partners the true test.—It is obvious, therefore, that the only true method of determining, as between the partners themselves, what belongs to the firm and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. The following cases, in which there was very little evidence to show what agreement had been made, may be usefully referred to on this subject.

Stock in trade and furniture.—In Ex parte Owen (*a*) one Bowers,

vided moneys of the partnership, is partnership property, although the conveyance is made to both the partners in their individual names. Paige *v.* Paige (Iowa), 32 N. W. Rep. 360.

If real property be purchased with partnership means, and used for partnership purposes, it is treated in equity as held by the partners in trust for the firm, subject to the same rules as apply to partnership personal property, and liable to the debts of the firm and the claims of the partners *inter se;* and this is so whether the title be vested in one or all of the members of the firm. Pepper *v.* Thomas (Ky.), 4 S. W. Rep. 297.

Real estate conveyed to all the members of a partnership, though purchased with the funds of the partnership and used for partnership purposes, vests, at law, in the partners as tenants in common; and a failure to dissolve an attachment of such estate, made in an action on a note given by the two partners individually, after the dissolution of the partnership, will not render the partnership liable to proceedings in insolvency. Ensign *v.* Briggs, 6 Gray (Mass.) 329.

Where land is conveyed to partners jointly, without any agreement that it shall be considered as joint stock, it will be treated as real estate belonging to them in common, though purchased with partnership funds, and to be used for partnership purposes. Smith *v.* Jackson, 2 Edw. (N. Y.) 28.

In Fall River Whaling Co. *v.* Borden (10 Cush. (Mass.) 458, 467, 470), lands were purchased by partners, and the deed taken to them as tenants in common. "The cost of the purchase went into the partnership accounts. The estates were entered into the company books as company property. As portions were sold for profit, from time to time, the proceeds were merged in the general funds of the copartnership. These lands were avowedly purchased for speculation." It was held that the lands were partnership property. The court say: "In order to affect lands with partnership equities, it is not necessary that such land should be the incident merely of a commercial partnership; but it may be, in part at least, the distinct substratum of a copartnership." See *infra,* note 11.

(*a*) 4 De G. & S. 351. See, also, Pilling *v.* Pilling, 3 De G., J. & S. 162. As to a lease of salt works belonging originally to one partner, but which became the property of the firm, Parker *v.* Hills, 5 Jur. (N. S.) 809, and on appeal, 7 Id. 833.

who was a grocer, provision dealer and wine merchant, and who possessed stock in trade and household furniture at his place of business, took two partners, without any agreement except that they were to participate in the profits of the concern. They brought in no capital and paid no premium, and no deed or agreement was executed. Bowers bought with his own money, but in the name of the firm, new stock required for the business. Upon the bankruptcy of the firm, the question arose to whom the stock in trade and furniture belonged. The court, coming to the best conclusion it could from such materials as were before it, held that there was an agreement between the three, expressed or implied, that all the stock in trade should become the property of the three, subject to an account, in *which the partnership would be debited in favor of Bowers for the value of the articles which belonged to him or for which he paid. But the court thought there was not the same ground for such an inference as to the household furniture, and that therefore was held to have continued and to remain the separate estate of Bowers.

*330]

Outlays on property.—Sometimes a firm lays out money on property which belongs exclusively to one partner; or some of the partners lay out their own moneys on the property of the firm, and in such cases the question arises whether the money laid out can be considered as a charge on the property on which it has been expended, or whether the owners of the property obtain the benefit of the outlay. The agreement of the partners, if it can be ascertained, determines their rights in such cases. But where, as often happens, it is extremely difficult, if not impossible, to ascertain what was agreed, the only guide is that afforded by the burden of proof. It is for those claiming an allowance in respect of the outlay to establish their claim. On the other hand, an intention to make a present of a permanent improvement is not to be presumed.

Houses built on partnership property.—In Re Streatfield, Lawrence & Co.(*b*) two partners bought an estate with partnership money. The land was conveyed to them in undivided moieties to

(*b*) Bank of England Case, 3 De G., F. & J. 645. In Pawsey *v.* Armstrong, 18 Ch. D. 698, an inquiry was directed as to buildings paid for out of partnership moneys, but erected on the separate property of one of the partners. See,

uses to bar dower, and each partner built a house on the land with money of the firm, but charged to him in his private account. An account was opened in the partnership books, and in this account the purchased estate was debited with all moneys of the partnership expended in the purchase. At the time of the purchase the land was in lease, but the tenant surrendered to the partners those portions which they wanted, they reducing his rent. The rents, viz., both that paid by the tenant for what he held, and that paid to him for what he gave up, were treated in the books of the firm as paid to and by it. There was evidence to show that the partners intended to come to some arrangement respecting the division of the estate, but *they became bankrupt before doing so. [*331
It was held that both the land and the houses on it were the joint property of the firm, and not the separate properties of the partners.

Appointments.—In Collins *v.* Jackson(*c*) two persons were in partnership as solicitors, and one of them held several appointments; he was clerk to poor-law guardians, superintendent registrar of births, marriages and deaths, treasurer of a turnpike trust, steward of a manor, treasurer of a charity, and receiver of tithes. The question arose whether the profits of these offices belonged to the partnership or not. There was no written agreement specifically applying to these offices, but there was a memorandum relating to some others reserved by the father of one of the partners when he retired from business, and the Master of the Rolls held that all the offices in question were to be treated as held on behalf of both partners, and not for the exclusive benefit of the partner who actually filled the offices.(*d*)[9]

Cases where co-owners share profits.—The cases, however, which

also, Burdon *v.* Barkus, 3 Giff. 412, and 4 De G., F. & J. 42, where a pit was sunk by the firm in a partner's property.

(*c*) 31 Beav. 645.

(*d*) See, also, Smith *v.* Mules, 9 Hare 556; and Ambler *v.* Bolton, 14 Eq. 427, as to the mode of dealing with such offices on a dissolution.

9. Appointments.—Where one of two partners agreed with a neighboring postmaster that the post office should be kept at the partnership store, the contracting partner being appointed deputy postmaster; but the business was transacted by the clerks of the store indiscriminately, no separate books being kept, and the money going into the partnership funds, and all payments on account of

present most difficulty are those in which the co-owners are partners in the profits derived from their common property.(*e*) Suppose, for example, that two or more joint tenants, or tenants in common, of a farm or a mine, work their common property together as partners, contributing to the expenses and sharing all profits and losses equally, there will certainly be a partnership; and yet, unless there is something more in the case, it seems that the land will not be partnership property, but will belong to the partners as co-owners, just as if they were not partners at all;(*f*) and the result may even be the same if they purchase, out of their profits, other lands for the purpose of more conveniently developing their business.(*g*)

Land acquired by devise farmed in common.—In Morris *v.* Barrett(*h*) lands were devised to two persons *as joint tenants. 332*] They farmed those lands together for twenty years, and kept their money in one common stock to which each had access, but they never came to any account with each other. Out of their common stock they bought other lands, which were conveyed to one of them only, but were farmed by both, like the first lands. It was held that the devised farms were not partnership property, but that the purchased farms were.

Joint tenants by devise partners in profits.—In Brown *v.* Oakshot(*i*) a brewer devised his real estates to trustees for a term of five hundred years, upon trust, to pay certain annuities, and to divide the surplus rents between his sons, and he devised the same estates, subject to this term, to his sons as joint tenants. The sons

the post office being made out of such funds, it was held that the profits of the post office belonged to the firm, especially as the partners had made several settlements between themselves, without any separate claim to those profits having been set up by the partner who contracted for the business. Caldwell *v.* Leiber, 7 Paige (N. Y.) 483.

(*e*) As to the distinction between co-ownership and partnership, see *ante* p. *51, *et seq.*

(*f*) See Crawshay *v.* Maule, 1 Swanst. 523; and Roberts *v.* Eberhardt, Kay 159. See, also, Williams *v.* Williams, 2 Ch. 294, where the partnership had expired, but an agreement to divide the property was held to have been come to.

(*g*) Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479, a case of a farm and quarry. But compare Morris *v.* Barrett, Phillips *v.* Phillips, and Waterer *v.* Waterer, cited below.

(*h*) 3 You. & J. 384. Compare Waterer *v.* Waterer, *infra*, p. *333.

(*i*) 24 Beav. 254.

carried on their father's business in partnership together, and used the real estates devised to them for the purposes of the business; but it was nevertheless held that the reversion in fee continued to be vested in them jointly, and not in common, as would have been the case had it become partnership property.

Public houses devised to partners in a brewery.—In Phillips *v.* Phillips(*k*) public houses were devised to two persons who carried on a brewery in partnership, and it was held that such houses did not become partnership property, though used for the purposes of the partnership. In the same case some mortgage debts secured on public houses were bequeathed to the two partners, and they afterwards purchased the equities of redemption, and paid for them out of the funds of the partnership, but it was held that the property thus acquired did not form part of the partnership property, the equities of redemption following the mortgage debts. But in this very case it was held that other public houses purchased by the partners out of the partnership funds, and used for the purposes of its trade, did form partnership property to all intents and purposes.(*l*)

Devisees of a trade and of land for the purpose of carrying it on.—On the other hand, in Jackson *v.* Jackson,(*m*) a testator had *devised to his two sons jointly, his trading business and [*333 lands used by him for the purpose of carrying it on. The sons took the business and carried it on in partnership; and it was held that the lands formed part of the partnership property, and did not belong to the sons as mere joint tenants. In this case, not only was there some evidence to show that the sons considered the land as part of their property as partners, but there was also this peculiarity: that a trading business was left to them, and that the land was accessory to that trade; so that it was very difficult, as observed by the Lord Chancellor, to sever the profits from the land

(*k*) As stated in Bisset on Partnership, p. 50. The report in 1 Myl. & K. 649, is silent as to the property devised. Mr. Bisset considers the decision as an authority on the point of conversion. But if, as he represents, the court came to the conclusion that the devised property was not, in fact, partnership property, the question of conversion would not arise. Compare Waterer *v.* Waterer, 15 Eq. 402, *infra*.

(*l*) 1 Myl. & K. 649.

(*m*) 9 Ves. 591, and 7 Id. 535. Compare this with Brown *v.* Oakshot, 24 Beav. 254, noticed *supra*.

and to hold the devisees to be partners as to the former, but not as to the latter.

Devisees of mines.—Upon this last ground it was held, in Crawshay *v.* Maule,(*n*) that mines devised to several persons for the express purpose of being worked by them in partnership, and which were worked accordingly, were partnership property.

Devise of nursery grounds.—In Waterer *v.* Waterer(*o*) a nurseryman who carried on business with his sons, although not in partnership, left his residuary estate, including the good will of his business, to his sons in common; they, after his death, carried on the business in partnership, and bought more land for the purposes of the business, and paid for it out of his estate; then one son died, and the others bought his share and paid for it out of money raised by mortgage of the nursery ground, and out of their father's estate. On the death of one of the surviving sons intestate, it was held that all the land thus acquired had become partnership property, and that the share of such son was to be treated as personal and not as real estate.[10]

(*n*) 1 Swanst. 495.

(*o*) Waterer *v.* Waterer, 15 Eq. 402. See, also, Davies *v.* Games, 12 Ch. D. 813, a similar case.

10. Nature of partners' interests in land.—Where real estate is conveyed to copartners, in their individual names, for the use and benefit of the firm, or in payment of debts due to the firm, the grantees become tenants in common of the land; and upon the death of either, the legal title to his undivided share descends to his heirs-at-law. Buchan *v.* Sumner, 2 Barb. (N. Y.) Ch. 165; Anderson *v.* Tompkins, 1 Brock. (U. S.) 456; Arnold *v.* Stevenson, 2 Nev. 234; Caldwell *v.* Palmer, 56 Ala. 405; Coles *v.* Coles, 15 Johns. (N. Y.) 159; Devine *v.* Mitchum, 4 B. Mon. (Ky.) 488; Donaldson *v.* Bank of Cape Fear, 1 Dev. (N. C.) Eq. 103; Ensign *v.* Briggs, 6 Gray (Mass.) 329; Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631; Willey *v.* Carter, 4 La. Ann. 56; Wood *v.* Montgomery, 60 Ala. 500.

Partners may stipulate between themselves that the ownership of property shall remain in one, the firm to have only the use of the same, or make any other regulation in regard to ownership of the property used, not prohibited by law. Taft *v.* Schwamb, 80 Ill. 289.

Where partners purchased a leasehold estate with partnership property, gave a deed of trust upon it, and the trustee, after the death of one of the partners, sold the estate under the power in the deed, a surplus remaining; it was held that the surplus was to be considered as partnership property, upon which the surviving partner was entitled to administer. Carlisle *v.* Mulhern, 19 Mo. 56.

Where land purchased with partnership funds is conveyed to the partners by a deed which would ordinarily make them tenants in common thereof, it will

Land acquired for the purposes of trade.—By a slight extension of the same principle, if several persons take a lease of a colliery, in order to work the colliery as partners, and they do so work it, the lease will be partnership property.(*p*) So, if co-owners of land form a partnership, and the land is merely accessory to their trade, and is treated as part of the common stock of the firm, the land will be partnership property.(*q*)

be deemed in equity converted into personal property, and may be administered upon as such, in winding up the affairs of the concern, unless, from the books or other sources, it appears that business profits were thus invested to pay a dividend to the partners. The intention of the partners in making the purchase, as shown by the evidence in the case, should govern the construction of the conveyance. Collum *v.* Read, 24 N. Y. 505.

Where land is purchased with partnership funds and conveyed to the partners by name, although in law they are considered as tenants in common, and no notice is taken of the equitable relations arising out of the partnership, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, in equity the partnership property will be devoted to partnership purposes, and a trust is created for the security of the partnership debts. If the partnership becomes insolvent, the property is primarily liable to the payment of the partnership debts, to the postponement of the creditors of the several partners. Ross *v.* Henderson, 77 N. C. 170; Robertson *v.* Baker, 11 Fla. 192.

Two persons took a lease of a coal mine as tenants in common. Afterwards they associated themselves in the business of coal mining, shipping and selling, as partners, the business to be carried on from the proceeds of the demised premises, for the whole period of the lease. *Held*, that the leasehold became partnership property. Patterson *v.* Silliman, 28 Pa. St. 304. See, also, Morton *v.* Ostrom, 33 Barb. (N. Y.) 256.

The appearance of real estate on partnership books to the extent necessary to carry on the business of the firm, is not inconsistent with the partners' title to the real estate as tenants in common. Grobb's Appeal, 66 Pa. St. 117.

Where a deed of land was made to A, B and C, "doing business as A, B & Co., their heirs and assigns," the grantees took in joint tenancy, and a judgment confessed by all of them in their individual names with the same words, "doing business, &c.," added thereto, was held to be a lien upon the land, and to bind it in the hands of subsequent purchasers from the firm. Lauffer *v.* Cavett, 87 Pa. St. 479.

While there may be partnerships in the business of milling, mining or farming, unless the intent of the joint owners to throw their real estate into the fund as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds for partnership purposes, it must still retain its character of realty. Wheatley *v.* Calhoun, 12 Leigh (Va.) 264.

(*p*) Faraday *v.* Wightwick, Taml. 250, and 1 Russ. & M. 45. See Bentley *v.* Bates, 4 You. & C. Ex. 182.

(*q*) Essex *v.* Essex, 20 Beav. 442.

*334] **Result of foregoing cases.*—Upon the whole, therefore, it seems that land acquired, whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership; but that land which is not so acquired, but which, belonging to several persons jointly or in common, is employed by them for their common profit, does not become partnership property unless there is some evidence to show that it has been treated by them as ancillary to the partnership business, and as part of the common stock of the firm. (*r*)[11]

Compare Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479.

(*r*) See Steward *v.* Blakeway, 4 Ch. 603, and 6 Eq. 479, and cases *ante* p. *332.

11. **Land acquired for the purposes of trade—when becomes partnership property.**—Where real estate is paid for with partnership funds, especially if it is needed and used for the ordinary business of the firm, it will afford a strong presumption that it was intended to be held as partnership property, and, in the absence of countervailing circumstances, this presumption will be decisive. Hoxie *v.* Carr, 1 Sumn. (U. S.) 173; Pugh *v.* Carrie, 5 Ala. 446.

Where the title to land belonging to a partnership is vested in one of the partners, the fact that it is partnership property may be established by parol. Zook *v.* Clemens, 41 Iowa 95; Block *v.* Seipt, 17 Week. N. C. 565; Bird *v.* Morrison, 12 Wis. 138; Collins *v.* Decker, 70 Me. 23; Drewry *v.* Montgomery, 28 Ark. 256; Fall River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458; Fairchild *v.* Fairchild, 64 N. Y. 471; In re Farmer, 18 Bankr. Reg. 207; Hauff *v.* Howard, 3 Jones (N. C.) Eq. 440; Hewitt *v.* Rankin, 41 Iowa 35; Little *v.* Snedcor, 52 Ala. 167; Sherwood *v.* St. Paul, &c., R. R. Co., 21 Minn. 127; Thompson *v.* Egbert, 3 Thomp. & C. (N. Y.) 474; S. C., 1 Hun 484.

The intention with which real property is purchased by a firm, and not the use to which it is put, determines the question whether it shall be deemed real or personal property. Holmes *v.* Self, 79 Ky. 297. Thus, improvements upon land owned by partners, as tenants in common, made with partnership funds, are partnership property. Lane *v.* Tyler, 49 Me. 252; Kendall *v.* Rider, 35 Barb. (N. Y.) 100; Hiscock *v.* Phelps, 44 N. Y. 97. See, also, Devenney *v.* Mahoney, 8 C. E. Gr. (N. J.) 247.

Where copartners take a lease which is silent as respects the partnership relation, the lease will be partnership property where the declarations of both partners that it was so taken and held are proved. Rust *v.* Chisolm, 57 Md. 376.

An oral agreement of two persons contemplating a partnership, to sell lands of each, and employ the proceeds as capital, is valid; and a ferry and franchise purchased by one, with the proceeds, is partnership property. Knott *v.* Knott, 6 Oreg. 142.

Where partners intend to bring real estate into partnership stock, that intention must be manifested by deed or writing placed on record. Hale *v.* Hen-

SECTION III.—CONVERSION OF JOINT ESTATE INTO SEPARATE ESTATE, AND VICE VERSA.

3. *Agreement sufficient to alter the ownership of property.*—It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property

ric, 2 Watts (Pa.) 143; Ridgway's Appeal, 15 Pa. St. 177.

In Pennsylvania, as respects strangers, partners' agreements to make real estate common stock must be in writing, and ought to be recorded. It cannot be shown by parol that real estate conveyed to two as tenants in common, is partnership property. Lefevre's Appeal, 69 Pa. St. 122. See, also, Ebbert's Appeal, 70 Pa. St. 79; Jones' Appeal, Id. 169; and Hale *v.* Henric, 2 Watts (Pa.) 143; Ridgway's Appeal, 15 Pa. St. 177.

Where it is attempted to be shown that a conveyance to one partner by a deed absolute on its face, was in fact a conveyance to him for the use of himself and his copartner as tenants in common, it is competent in rebuttal to show by parol that it was owned by them as partnership property. Black's Appeal, 89 Pa. St. 201.

Where property so purchased does not become partnership property.—The mere fact that a firm carry on business on a lot of land belonging to the members of the partnership, does not necessarily impress it with the character of partnership property, unless they have, by agreement or otherwise, purposely impressed upon it that character. Ware *v.* Owens, 42 Ala. 212; Pecot *v.* Armelin, 21 La. Ann. 667.

Where land is purchased by partners with partnership funds, but not for the use and convenience of the partnership business, or in the legitimate line of their partnership business, they become invested with the title as tenants in common, and their respective interests therein are several. Price *v.* Hicks, 14 Fla. 565; Russell *v.* Miller, 26 Mich. 1.

In Louisiana, real estate owned by commercial partners does not enter into their commercial assets. They are joint owners. Guilbeau *v.* Melancon, 28 La. Ann. 627. And if immovable property is purchased with partnership funds by one partner in his own name, without the consent of his copartners, the property itself belongs to the partner purchasing, but its value at the time of purchase belongs to the firm. No decree could be rendered to vest the title of such property in the firm, for the partnership is incapable of acquiring title. McKee *v.* Griffin, 23 La. Ann. 417.

There is no presumption that a leasehold standing in the name of one of several partners, and used by the firm for their business, constitutes partnership assets. The presumption is otherwise; its mere use for partnership purposes does not operate to divest or affect the legal title. Chamberlain *v.* Chamberlain, 44 N. Y. Super. Ct. 116.

Land purchased with firm funds, but not intended to become partnership property, and not treated as such, will not be so considered. Providence *v.* Bullock, 14 R. I. 355.

Illustrations.—Where an undivided half interest in land was bought and paid for by each of two partners, who, with partnership funds, completed, re-

of an individual partner, or *vice versa.*(*s*) And the nature of the property may be thus altered by any agreement to that effect; for

paired, improved and protected it, and used it for partnership purposes, it was held that the land became partnership property. Roberts *v.* McCarty, 9 Ind. 16.

Real estate sold at a judicial sale was knocked down to A and B, partners, A having bid it in in pursuance of an understanding between him and his partner to buy it for the firm. In order, however, to avoid the necessity of getting outsiders to go on the bonds for their purchase money, they had the sale entered in B's name, and he signed the bonds as principal and A as surety. *Held*, that the real estate was partnership property. Seiler *v.* Brenner (Ky.), 3 S. W. Rep. 796.

Where a member of a copartnership conveyed an undivided half interest in fee simple in a house and lot to his copartner, who thereupon moved into it and duly filed and recorded his declaration claiming it as a homestead—*Held*, that it being clear that it was not the intention of the copartners to hold the property as assets of the partnership, the same was not subject to the doctrine of equitable conversion, and the partners held the realty merely as tenants in common. Lindley *v.* Davis (Mont.), 14 Pac. Rep. 717.

Where real property was bought for the purpose of being used by a company formed for the purpose of carrying on a mechanical trade, and was so used, and had been so used by several companies before this, and was necessary to the carrying on of such business, and was mentioned in the several deeds to the several partners as a part of the effects of the partnership—*Held*, that there was a trust of such real property, by operation of law, for the partnership, as tenants in common, though it had not been declared in writing. Hanff *v.* Howard, 3 Jones (N. C.) Eq. 440.

Where B., owning a saw mill property, formed a partnership with F. in the lumber business, agreeing by parol that the mill estate should constitute part of the partnership fund, and F. paid a part of the consideration in cash, the rest to be paid out of the profits of the business, it was held that the title of B. did not pass to the firm, although F. went into possession with B. and improvements were made upon the property out of the firm funds. McCormick's Appeal, 57 Pa. St. 54.

The rule in courts of equity.—The general rule as applied in courts of equity is that real estate purchased for, and appropriated to or intended to be used for partnership purposes, and paid for out of partnership funds, is partnership property, although the legal title is taken in the individual names of the partners, or in the name of one of the partners, or in the name of a third person. Equity will hold the party holding the legal title, or his heirs in case of his death, as trustee for the firm. Fairchild *v.* Fairchild, 64 N. Y. 471; S. C., 5 Hun 407; Abbott's Appeal, 50 Pa. St. 234; Bird *v.* Morrison, 12 Wis. 138; Boyers *v.* Elliott, 7 Humph. (Tenn.) 204; Buffum *v.* Buffum, 49 Me. 108; Buchan *v.* Sumner, 2 Barb. (N. Y.) Ch. 165; Chamberlain *v.* Chamberlain, 44 N. Y. Super. Ct. 116; Cilley *v.* Huse, 40 N. H.

(*s*) Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 Id. 3; Ex parte Fell, 10 Id. 348; Ex parte Rowlandson, 1 Rose 416.

neither a deed nor even a writing is absolutely necessary;(*t*) but so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged. (*u*) [12]

358; Delmonico *v.* Guillaume, 2 Sandf. (N. Y.) Ch. 561; Deming *v.* Colt, 3 Sandf. (N. Y.) Ch. 284; Devenney *v.* Mahoney, 8 C. E. Gr. (N. J.) 247; Dewey *v.* Dewey, 35 Vt. 555; Drewry *v.* Montgomery, 28 Ark. 256; Dupuy *v.* Leavenworth, 17 Cal. 262; Erwin's Appeal, 39 Pa. St. 535; Fall River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458; Faulds *v.* Yates, 57 Ill. 416; Fowler *v.* Bailley, 14 Wis. 125; Hewitt *v.* Rankin, 41 Iowa 35; Hiscock *v.* Phelps, 49 N. Y. 97; Hogle *v.* Lowe, 12 Nev. 286; Indiana, &c., Co. *v.* Bates, 14 Ind. 8; Jar-

(*t*) See Pilling *v.* Pilling, 3 De G, J. & S. 162; Ex parte Williams, 11 Ves. 3; Ex parte Clarkson, 4 Deac. & C. 56, per Sir G. Rose; Ex parte Owen, 4 De G. & S. 351. None of these cases, however, turned on the effect of an unwritten agreement relating to land. See, as to a transfer by a partner of his shares in the partnership property when it consists wholly or in part of land, *post* ch. 5, § 5.

(*u*) Ex parte Wheeler, Buck 25; Ex parte Cooper, 1 Mont., D. & D. 358; Hawkins *v.* Hawkins, 4 Jur. (N. S.) 1044.

12. Agreement sufficient to alter the ownership of property.—It is competent for partners to agree among themselves that certain real estate owned by the partnership shall be leased, and that each shall be entitled to his proportion of the rent, shall collect and may discharge it. A party, renting with knowledge of the agreement, contracts with each to pay him his proportion of the rent, and he may sue for it in his own name. And one partner may be a witness for another in such suit. McDougald *v.* Banks, 13 Ga. 451.

A firm may take a separate negotiable security from one of the partners, and use it for its own purposes; more especially may it do so, where the individual partner acts as the agent of third persons. Baring *v.* Lyman, 1 Story (U. S.) 396.

Debts due to a firm may be assigned to either of the partners, and a note given to the assignee for the amount due by a debtor to the firm, extinguishes the debt to the partnership. Lamkin *v.* Phillips, 9 Port. (Ala.) 98.

Where a note endorsed in blank by a copartnership remains, after dissolution of the same, in the hands of a partner, who transfers it in payment of his individual debt, in default of showing to the contrary it will be presumed to be his individual property. Fletcher *v.* Anderson, 11 Iowa 228.

Where a member of a partnership allows his private property to be mingled with that of the firm, and to be sold with their property as part thereof, the purchaser will be liable for the price only to the firm. White Mountain Bank *v.* West, 46 Me. 15.

Where a copartnership, to which a lien has accrued for work done and money expended upon machinery, is dissolved, and the interest in the lien assigned to one partner, the lien is not lost, but may be enforced by such partner in the firm name. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Where the partner whose duty it was to furnish the capital put in as part thereof personal chattels necessary to

Creditors not entitled to be consulted.—Moreover, as the ordinary creditors of an individual have no lien on his property, and cannot

vis *v.* Brooks, 27 N. H. 37; Johnson *v.* Clark, 18 Kan. 157; King *v.* Weeks, 70 N. C. 372; Lacy *v.* Hall, 37 Pa. St. 360; Lancaster Bank *v.* Myerley, 13 Pa. St. 544; Little *v.* Snedcor, 52 Ala. 167; Lime Rock Bank *v.* Phetteplace, 8 R. I. 56; Matlack *v.* James, 2 Beas. (N. J.) 126; McGuire *v.* Ramsey, 9 Ark. 518; Rammelsberg *v.* Mitchell, 29 Ohio St. 22; Owens *v.* Collins, 23 Ala. 837; Price *v.* Hicks, 14 Fla. 565; Smith *v.* Tarleton, 2 Barb. (N. Y.) Ch. 336; Uhler *v.* Semple, 5 C. E. Gr. (N. J.) 288; Whitney *v.* Cotton, 53 Miss. 689. And real estate so held will be liable to all the incidents attending that species of property. Sigourney *v.* Munn, 7 Conn. 11; Abbott's Appeal, 50 Pa. St.

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carrying on the business, it was held that such chattels became partnership property, and could not be converted into individual property by an agreement for dissolution, until the firm debts were paid. Clements *v.* Jessup, 9 Stew. (N. J.) 569.

The premium on bills of exchange, drawn for part of the capital furnished by a partner, belongs to the partnership, and not to the individual partner. But where such a premium had been credited to a partner as a part of his capital, and it appeared that this application had long been acquiesced in—*Held*, that it was too late to question it. Stoughton *v.* Lynch, 2 Johns. (N. Y.) Ch. 209.

When the members of a firm, by agreement among themselves, make an actual division between them of part of the firm's assets, and allot to each, as his own property, specific portions thereof, and the division thus made is assented to and acted upon by all the partners, the title to the part so allotted to each becomes thereby his exclusive individual property. Crosby *v.* Nichols, 3 Bosw. (N. Y.) 450.

Where partners have agreed to dissolve their copartnership, and have divided the partnership property according to their separate interests, the portion allotted to each becomes his separate property, and neither of them, by reason of his liability for the partnership debts, or his payment of them, has any lien upon the others' portions. He has no remedy, therefore, in equity. Holmes *v.* Hawes, 8 Ired. (N. C.) Eq. 21.

Two partners, on settlement with a creditor of their firm, after dissolution, gave their separate bonds to the creditor, each for one-half the debt, and agreed that the amount which might be recovered on a certain *chose in action* in the hands of the creditor, which belonged to the firm, should be applied to the payment of the bonds. *Held*, that the joint interest of the partners in the *chose in action* was severed by agreement, and that one partner afterwards had a right to direct his half to be applied to the payment of his bond, and that the creditor had a right so to apply it. Rowand *v.* Fraser, 1 Rich. (S. C.) 325.

Where one of the partners buys a horse with his private funds, under an agreement to allow his copartner to elect to take him at the cost price, and for some days the horse is kept and used with the horses of the partnership, until the partner, in the exercise of his election, sells him, such sale is not a partnership transaction. Hatch *v.* Foster, 27 Vt. 515.

prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to

234; Brooke *v.* Washington, 8 Gratt. (Va.) 248; Hoxie *v.* Carr, 1 Sumn. (U. S.) 173; Lancaster Bank *v.* Myerley, 13 Pa. St. 544; Matlock *v.* Matlock, 5 Ind. 403; Pugh *v.* Carrie, 5 Ala. 446; Smith *v.* Jackson, 2 Edw. (N. Y.) 28; Arnold *v.* Wainwright, 6 Minn. 358; Andrews *v.* Brown, 21 Ala. 437; Black *v.* Black, 15 Ga. 445; Coles *v.* Coles, 15 Johns. (N. Y.) 159; Davis *v.* Christian, 15 Gratt. (Va.) 11; Day *v.* Perkins, 2 Sandf. (N. Y.) Ch. 359; Devine *v.* Mitchum, 4 B. Mon. (Ky.) 488; Ferguson *v.* Hass, Phil. (N. C.) Eq. 113; Foster *v.* Barnes, 81 Pa. St. 377; Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631; Hill *v.* Beach, 1 Beas. (N. J.) 31; Ludlow *v.* Cooper, 4 Ohio St. 1; Mauck *v.* Mauck, 54 Ill. 281; Moderwell *v.* Mullison, 21 Pa. St. 257; Morgan *v.* Olney, 53 Ind. 6; Nichols *v.* Ogden, 29 Ill. 323; Piatt *v.* Oliver, 3 McLean (U. S.) 27; Rammelsberg *v.* Mitchell, 29 Ohio St. 22; Scruggs *v.* Blair, 44 Miss. 406; West *v.* Hickory Mining Assoc., 80 Pa. St. 38; Whitney *v.* Cotton, 53 Miss. 689.

Property so purchased and held is considered as personal property to this extent at least: that it is liable to pay the debts of the firm, and the surviving partner has a claim on it for that purpose, which is superior to the title of the widow and heirs-at-law of the deceased partner. Andrews *v.* Brown, 21 Ala. 437.

But this rule grows out of the peculiar nature of the partnership relation, and is adopted for the purpose of doing justice between partners, or between them and others having dealings with them, and for the purpose of properly adjusting the relations between them, or between them and others having dealings with or relations to the partnership. It is not an arbitrary rule, by which a court of equity transmutes real estate into personal property when it is once owned and possessed by a partnership, and causes it to take that character outside of and independent of the exigencies of the partnership. Black *v.* Black, 15 Ga. 445.

Although a court of equity considers and treats real property, purchased with the partnership funds and held for the purposes of the firm, as constituting part of the stock of the partnership, it leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners. Lang *v.* Waring, 25 Ala. 625. Such real estate is regarded in equity as personal property, so far as may be necessary for the payment of debts, and an adjustment of accounts between the partners. Davis *v.* Smith (Ala.), 2 So. Rep. 897. It is to be regarded, at law, as held and owned by them as tenants in common, in the absence of any agreement or understanding to the contrary, and is subject to be so treated. But in equity it should be regarded as held in trust as partnership property, and subject to the rules applicable to partnership personal property, and liable to the claims of the partners upon each other, and the debts of the partnership. Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631; Devine *v.* Mitchum, 4 Id. 488; Coles *v.* Coles, 15 Johns. (N. Y.) 159.

Real property so purchased which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate. Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Scruggs *v.*

be able to prevent it from parting with that property to whomsoever it *chooses. Accordingly it has frequently been held [*335 that agreements come to between partners converting the

Blair, 44 Miss. 456. See, however, Thayer *v.* Lane, Walk. (Miss.) Ch. 200.

Land so purchased is to be deemed personalty, although the title is held by one of the partners Rank *v.* Grote, 50 N. Y. Super. Ct. 275.

Land bought by a partnership at joint expense, and to be sold upon joint account, will be considered personal property in equity, if that appears to have been the intention of the parties. Ludlow *v.* Cooper, 4 Ohio St. 1.

When real estate is brought into partnership, it is treated in equity as personal estate, and a lease thereof by one partner in his own name enures to the benefit of the firm. Moderwell *v.* Mullison, 21 Pa. St. 257.

Illustrations.—Two partners holding unequal interests, having foreclosed a mortgage upon real estate taken to indemnify the partnership against a certain securityship, bid in the property, and the land was conveyed to them jointly, without designating their respective interests. *Held*, that each took a moiety of the legal title, but that in equity they would hold according to their respective interests; and that a conveyance by the executor of the partner holding the greater interest "of all the right, title, and interest which the testator had at the time of his decease," would pass to the grantee the legal title to one-half the land, and the equitable title to the additional interest held by the testator; and that one holding under this grantee, without notice of the nonpayment of the purchase money of the equitable interest, would hold it discharged of the vendor's lien. Putnam *v.* Dobbins, 38 Ill. 394.

Where one of a firm of four brothers purchased, in his own name, a lot, and leased it to the firm, and the firm erected its oil refinery thereon, it was held that his three brothers could not, in an equity proceeding, afterwards claim that the lot should be treated as firm property, although he had acted in bad faith in procuring the conveyance to himself rather than to the firm—his act having been long acquiesced in by the three others without an investigation of the false and flimsy reason he had assigned therefor. Slemmer's Appeal, 58 Pa. St. 168.

Rights of creditors.—Creditors of the firm and of the individual partners, may contest the question whether real estate by the firm is partnership property or individual property. The presumption that it is partnership property is not conclusive as against them. Osborn *v.* McBride, 16 Bankr. Reg. 22.

Land owned and held by a firm as firm property, is only to be treated as personalty so far as necessary to secure the payment of the firm debts, and advances made by the partners respectively; for every other purpose it remains real estate. Re Codding, 9 Fed. Rep. 849; S. C. 16 West. Jur. 194.

When the legal title to real estate belonging to a partnership is vested in one of its members, the lien acquired by a judgment against him individually, in favor of a creditor of the company, is subject to the equities already existing over the property; and a judgment against the company itself would not operate as an efficient lien on the land. Coster *v.* Bank of Georgia, 24 Ala. 37.

Employing partnership funds in making permanent improvements upon real

property of the firm into the separate estate of one or more of its members, and *vice versa*, are, unless fraudulent, binding not only as

property owned by the partners, and appropriated to the partnership business, is not necessarily a fraud upon the creditors of the firm, if no intent to defraud is shown. Parker *v.* Bowles, 57 N. H. 491.

In equity real estate bought for the use of the firm with the firm money, and used in its business, will be applied to liquidating partnership in preference to individual liabilities. Messer *v.* Messer, 59 N. H. 375.

In a contest between individual and firm creditors, a conveyance to copartners creates a tenancy in common, unless the deed otherwise provides, although the purchase money is taken from the partnership funds. Black *v.* Seipt, 12 Phil. (Pa.) 360.

Land purchased with partnership funds for partnership use is subject to firm debts, including debts due one of the partners by the firm, and in preference to individual debts. Diggs *v.* Brown, 78 Va. 292.

—of purchasers.—The interest of the survivor in his deceased partner's share of real estate held in the name of the firm, is equitable merely, and one who purchases it under a judgment and execution at law against the survivor acquires no such title as a court of equity will enforce. Lang *v.* Waring, 17 Ala. 145.

A *bona fide* purchaser of real estate from a member of a copartnership, for a valuable consideration and without notice of the partnership character of the property, purchasing only to the extent of the grantor's legal title, will take the title freed from the equitable claims of others, partners or creditors of the firm. Dupuy *v.* Leavenworth, 17 Cal. 262.

A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside, on the ground that it was made without their consent, and impairs the credit of the firm. Treadwell *v.* Williams, 9 Bosw. (N. Y.) 649.

If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or, at least, to enable them to do so they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners. Ib.

—of heirs of deceased partner.—The real estate of a partnership is held as personalty for the purposes of the partnership, but where not needed for such purposes it descends, as other real estate, to the heir. Williamson *v.* Fontain, 7 Baxt. (Tenn.) 212; Gaines *v.* Catron, 1 Humph. (Tenn.) 514; McAllister *v.* Montgomery, 3 Hayw. (Tenn.) 94; McGrath *v.* Sinclair, 55 Miss. 89; Piper *v.* Smith, 1 Head (Tenn.) 93; Summey *v.* Patton, 1 Winst. (N. C.) Eq. (No. II.) 52; Yeatman *v.* Woods, 6 Yerg. (Tenn.) 20.

A partnership "for the purchase of lands" does not necessarily contemplate sales of land so as to make the land stock in trade, but it passes to the heir as real estate, and not to the administrator. Dilworth *v.* Mayfield, 36 Miss. 40.

Land acquired by a partnership in the course of its dealings, for partnership purposes, is partnership property, and

between the partners themselves, but also on their joint and on their respective several creditors; and that in the event of bankruptcy the trustees must give effect to such agreements.(x) [13]

the legal title survives upon the death of a partner; and a sale thereof, ordered in a suit to settle the partnership affairs, binds the heirs of the deceased partner, though not parties to the suit. Waugh *v.* Mitchell, 1 Dev. & B. (N. C.) Eq. 510.

Where a partner dies, his personal representative, not his heir, succeeds to his interest in lands bought by the firm for firm purposes, before liquidation. Leaf's Appeal, 105 Pa. St. 505.

— of persons holding liens.—A person who loans the entire capital to an individual partner for the purpose of commencing business, acquires an equity equal to that of the creditors of the partnership; and if the money is used in purchasing lands, which are afterwards mortgaged to the lender by the individual partner to secure the loan, the former will acquire an equity superior to that of the creditors of the partnership, but subject to the lien of the other partner, if he purchases with notice of his equitable title to an undivided half. Reeves *v.* Ayres, 38 Ill. 418.

The Scotch law.—"The property of the company is common; held *pro indiviso* by all the partners, as a stock, and in trust; responsible for the debts of the concern; and subject, after the debts are paid, to division among the partners according to their agreement. This is a great point in the doctrine of partnership, and important consequences are deducible from it. The common stock includes all lands, houses, ships, leases, commodities, money; whatever is contributed by the partners to the company use. It comprehends also whatever is created by the joint exertions of the company, or acquired in the course of the employment of their capital, skill, and industry. All this by the operation of law, and the nature and effect of the contract, becomes common property; is held by all the partners jointly for the uses of the partnership; and is directly answerable as a stock for the payment of its debts. 1. *Vesting of the stock.*—The stock or common fund is held by the partners *pro indiviso*. And, 1. This *pro indiviso* right implies, as between the parties themselves, a right of retention in each partner over the stock, for any advances which he may have made to the company, or for any debt due by the company for which he may be made responsible. 2. It also implies, in relation to the public at large, creditors of the company, a trust in the several partners, as joint trustees for payment, in the first place, of the company debts. And on this point rests (1), the preference, which the creditors of the company have over the company funds; none of the partners, nor any one in their right, as individual creditors or

(x) See Ex parte Ruffin, and the other cases cited in the last two notes, and Campbell *v.* Mullett, 2 Swanst. 575; Ex parte Clarkson, 4 Deac. & C. 56; Ex parte Peake, 1 Madd. 358.

13. Creditors not entitled to be consulted.—A distribution by partners among themselves of part of their stock in trade, if made with the assent of creditors, is not fraudulent. Wilkinson *v.* Yale, 6 McLean (U. S.) 16.

Where one partner buys out the whole, agreeing to pay all the debts, the firm creditors have a lien on the property

A conversion of joint into separate property, or *vice versa*, most frequently takes place when a firm and one of its partners carry on

otherwise, being entitled to more than the reversion after the purposes of the trust are fulfilled; and (2), the peculiarity that hereditable subjects belonging to and held by a company are considered not as hereditable in succession, but as movable; consisting of the *jus crediti* only. 3. In this respect, the contract of partnership has the effect of a direct conveyance of property to the company of whatever is engaged to be given, or by clear evidence is contributed to the use of the company by any of the partners, to whom it belongs. The contract does not indeed supersede the necessity of the completion of the transference by tradition or otherwise; but it operates as a conveyance (*titulus transferendi dominii*), which, when followed by tradition, possession, intimation, and the other methods of completing a transference by law, vests the property in the partners, jointly for the purposes already expressed. 'Society,' says Lord Stair, 'is not so much a permutative as a commutative contract, whereby the contractors communicate to each other some stock, work, or profit. The effect of society is that thereby something, which before was proper, becometh, or is continued to be, common to the copartners.' He adds: 'Yet this communication is not effectual to transfer the property in part, or to communicate it without delivery or possession, by which property by positive law is transferred.' This distinction is of some consequence. Where the question is between the parties and their representatives, as to what shall be considered as the estate of the company, but without involving any competition with third parties, whatever falls under the fair construction of the contract will, as a personal right, belong to the company and its creditors. But where there arises a competition depending on the question of real right, it will be determined according to that criterion of real right which the law has appointed in cases of transference. But in determining what shall amount to an engagement to contribute, and consequent conveyance of a particular subject, it is not always the use of the subject that will settle the point. In one case, certain subjects, of which the use was given to the company, were held to be fairly intended as part of the stock, from the way in which they were mentioned in the inventories. In another nearly similar case, the same inference was avoided, the partnership not being of a permanent character, but a momentary joint adventure merely. In respect to movables, all commodities comprehended within the partnership, and in possession of the partner, to whom they previously belonged, are held, as by *traditio brevis manus*, to be

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superior to any claims of that partner's private creditors. Conroy *v.* Woods, 13 Cal. 626.

Where a retiring partner *bona fide* assigns all his interest in the stock and effects to the remaining partner, whether the partnership be general or limited, the same thereby becomes separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner. Upson *v.* Arnold, 19 Ga. 190.

Creditors have only a *quasi* lien upon partnership effects, which may be enforced in a court of equity as a derivative subordinate right through the lien

distinct trades, or when a change occurs in a firm by the retirement of some or one of its members, or by the introduction of a new partner.

vested in the company; for the partners having power to hold for the company as *præpositi*, their possession will be presumed to be for the common behoof. But money due by a third party to an individual partner, or commodities in the hands of third parties, contributed by the owner as part of his stock, will not be transferred without delivery or intimation. The creditors of the owner, using attachment by diligence before intimation of the partnership, would attain a preference over the company. Ships must be transferred according to the directions of the statute. 4. As to land and other property, which, by the forms of territorial conveyance, require to be transferred by deed, the partnership will acquire by the contract nothing more than the *jus ad rem*. If, for example, a cotton mill is, by the agreement, contributed as his share of stock, on the part of the owner, this will not feudally transfer to the company the property of the mill, so as to entitle them to exclude the adjudication of the separate creditors of the proprietor trusting to the record. But it will, like a general disposition, confer on the company a *jus ad rem*, by virtue of which they may, in a declarator and adjudication in implement, have that property declared and adjudged to the partners jointly, or to a trustee, as part of the stock of the concern. 5. Such personal property as may have been acquired in the name of the society becomes *eo ipso* the property of the partnership, although purchased by an individual partner with his own money. He is *præpositus* of the company, and entitled to advance money and acquire property directly for the common behoof. 6. Such personal property as a partner acquires, even in his own name, provided it be beneficial acquisition and in the company's line of trade, is, according to the spirit of the contract of partnership, to be held as acquired for the company, and the company will be entitled to claim it. But it would rather seem that in such a case the property would pass to the partner in real right, with a *jus ad rem* to the company and its creditors. 7. A partner who binds himself to pay a sum or fungible into the stock is debtor to the company; and the loss of the money or fungible, before being put into stock, is his private loss. If he has engaged to put in a specific subject into stock, and it perish, the loss is to the company, unless the partners shall be *in mora*." 2 Bell Com., B, 7 (5th ed.), c. 1, pp. 613–615.

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and equity of the partners. Guyton *v.* Flack, 7 Md. 398; Black *v.* Bush, 7 B. Mon. (Ky.) 210; O'Bannon *v.* Miller, 4 Bush (Ky.) 25; Bank of Kentucky *v.* Herndon, 1 Id. 359. See, also, Tillinghast *v.* Champlin, 4 R. I. 173; Shackleford *v.* Shackleford, 32 Gratt. (Va.) 481.

Where one of two partners, with the consent of the other, sells and conveys one-half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *prima facie* void as against the creditors of the firm, but are *prima facie* valid against all the world, and can be set aside only by the creditors of the firm, upon their proving the trans-

Dealings between one partner and the firm.—When a firm and one of its members carry on distinct trades, property passing in the

actions to be fraudulent as against them. Kimball *v.* Thompson, 13 Metc. (Mass.) 283.

Though a creditor might object to a transfer of partnership *choses in action* from the debtor firm to their successors, yet a debtor to the firm cannot object that the old firm had no power to dispose of its property without first settling its affairs. Pease *v.* Rush, 2 Minn. 107.

Members of an insolvent partnership cannot, by mutual consent, divide the partnership funds between themselves, so as to enable each member to apply the part allotted to him, in a preferred payment of his separate debts, leaving the joint debts unsatisfied; and a transfer of such partnership property to an individual creditor, in payment of an antecedent debt, with a knowledge on the part of the creditor of such design, will not enable him to hold it discharged from the equitable lien of the partnership creditors. Burtus *v.* Tisdall, 4 Barb. (N. Y.) 571.

A release from one partner to another of his interest in the partnership effects, taken with full knowledge of, and subject to all the equities between the parties, is not such a sale as would deprive the vendor of his right of action for goods which he alleged such partners, as a firm, had fraudulently obtained from him. Ward *v.* Woodburn, 27 Barb. (N. Y.) 346.

The division, by partners, of the partnership assets between themselves, and the transfer of such assets by the individual partners, in payment of their private debts, when the partnership is insolvent, is, in point of law, a fraud upon the partnership creditors. Ransom *v.* Van Deventer, 41 Barb. (N. Y.) 307.

A creditor in embarrassed circumstances, finding the firm of which he is a member about to fail, may at fair prices make a valid transfer of his private property to his private creditors, in payment of honest private debts, in preference to those of the firm; provided, also, there is nothing to impeach the good faith of the grantees. Auburn, &c., Bank *v.* Fitch, 48 Barb. (N. Y.) 344.

Where, upon dissolution, one of two partners takes the property and the right to use the firm name in continuing the business, and agrees to pay the debts, the facts of his continuing in the business under the same style and in the same manner as before, and employing the retiring partner as a salesman at a rate agreed upon, will not, of themselves, warrant the inference that the transfer from the retiring partner was fraudulent as against his creditors, or subject the property to liability to levy by his individual creditor who became such after the dissolution. Hamill *v.* Willett, 6 Bosw. (N. Y.) 533.

Where two partners in a firm purchase the interest of a third partner, and form a new firm, and subsequently make an assignment for the benefit of creditors, providing for the payment of debts due from the new firm, or the old firm, "or either of the members" of the two firms, such assignment is invalid as to creditors of the old firm. Lester *v.* Pollock, 3 Robt. (N. Y.) 691.

A docket entry at the instance of a partner, assigning a firm claim without consideration, is void as against creditors of the firm. Updegraff *v.* Rowland, 52 Pa. St. 317.

The rule that the creditors of a firm have no equitable lien upon the copart-

ordinary way of business from the partner to the firm, ceases to be his and becomes the property of the partnership, and *vice versa*,

nership property, but can only work out such a lien through the equities of the copartners, applicable whilst the copartners are administering their own funds, has no application to the case of a copartnership dissolved by the death of one of the copartners, especially if the surviving partner be insolvent, or where, though living, one or both the copartners have become insolvent or bankrupt, so that their property is in the hands of assignees for distribution. Tillinghast *v.* Champlin, 4 R. I. 173.

One partner may assign his interest in the partnership property to his separate creditor, and the assignment will be good against the creditors of the firm afterwards attaching. Wilson *v.* Bowden, 8 Rich. (S. C.) 9; Norris *v.* Vernon, Id. 13.

If either partner has contracted a debt in his own name, in which, as between themselves, the other partner should share, that liability is a sufficient consideration as against joint creditors for a transfer of firm property, while free from the operation of insolvent laws, for the payment of that debt. Marks *v.* Hill, 15 Gratt. (Va.) 400.

Illustrations.—A and B being the only copartners in one company, and being likewise partners with other persons in two other companies, A made a deed-poll to B of all the grantor's interest in certain real estate and in the personal property of the three companies, the deed being nominally for a pecuniary consideration, and containing a covenant that the grantee would indemnify the grantor against all the debts due from the three companies. The deed was accepted by the grantee, but was not executed by him. It was held that as the grantee would be liable in *assumpsit* as upon an implied promise to pay the creditors and indemnify the grantor, this was a valid consideration for the deed as against partnership creditors of A & B. Guild *v.* Leonard, 18 Pick. (Mass.) 511.

When, upon some disagreement between partners, their differences were submitted to arbitrators, who awarded that all the goods and other assets of the firm should pass to one of the partners, who should pay all the partnership debts, and thereupon such goods and assets were all attached by private creditors of such partner, and subsequently by the creditors of the firm, it was held that the creditors of the firm were entitled to be preferred, even if the award had been executed by a transfer in accordance with it. Tenney *v.* Johnson, 43 N. H. 144.

Where a partner gave a mortgage on his separate property, creating thereby a preference in favor of a partnership creditor, it was held that the mortgage was not thereby void and fraudulent as against the separate creditors of the mortgagor; though, on complaint made in their behalf as a class, the mortgage might be declared void as to such creditors. Stewart *v.* Slater, 6 Duer (N. Y.) 83.

Where one of two partners, by a mortgage deed, conveys to the other partnership effects, to secure debts alleged to be due from the one to the other, which deed and effects are assigned to *bona fide* creditors of the mortgagee, to secure debts due from him to such creditors, such conveyance was held to be valid against creditors of the firm who had no lien. Potts *v.* Blackwell, 3 Jones (N. C.) Eq. 449.

just as if he were a stranger to the firm. This was settled in the great case of Bolton *v.* Puller, (*y*) in which there were two banking firms, one carrying on business at Liverpool and one in London. All the partners in the latter firm were partners in the former. Some bills of exchange came, in the ordinary course of business, into the hands of the Liverpool firm, to be placed to the general account of its customers. These bills were remitted by the Liverpool firm to the London firm, to be placed to the credit of the former in the general account between the two houses. Both houses afterwards becoming bankrupt, it was held that the bills were the property of the London firm and not of the Liverpool firm, or of its customers. Lord Chief Justice Eyre, in delivering judgment, adverted to the question now under consideration in the following terms:

"There can be no doubt that as between themselves a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general
*336] partnership is not interested; and that they may by *their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *è converso.* And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership." [14]

See, also, as bearing out the text, Allen *v.* Centre Valley Co., 21 Conn. 130; Beeves *v.* Ayers, 38 Ill. 419; Case *v.* Beauregard, 99 U. S. 119; S. C., 1 Woods (U. S.) 127; Field *v.* Chapman, 15 Abb. (N. Y.) Pr. 434; Gwin *v.* Selby, 5 Ohio St. 96; Locke *v.* Lewis, 124 Mass. 1; Mayer *v.* Clark, 40 Ala. 259; Miller *v.* Price, 20 Wis. 117; Pfirrman *v.* Koch, 1 Cinc. (O.) 460; Potts *v.* Blackwell, 4 Jones (N. C.) Eq. 58; Rankin *v.* Jones, 2 Id. 169; Reese *v.* Bradford, 13 Ala. 837; Robb *v.* Mudge, 14 Gray (Mass.) 534; Schmidlapp *v.* Currie, 55 Miss. 597; Sigler *v.* Knox Co. Bank, 8 Ohio St. 511; State *v.* Thomas, 7 Mo. App. 205; Weaver *v.* Ashcroft, 50 Tex. 428; White *v.* Parish, 20 Id. 688; Wilcox *v.* Kellogg, 11 Ohio 394.

(*y*) 1 Bos. & P. 539.

14. Dealings between one partner and the firm.—A *bona fide* mortgage, given by a member of a firm to the firm, is valid, and in no sense a mortgage to the grantor himself. Galway *v.* Fullerton, 2 C. E. Gr. (N. J.) 389.

Where two of three partners of a firm, engaged in building a mill, bought lumber with their own money, and delivered it on the ground where the mill was

Change of property on change in firm.—Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with. So, again, when a partnership is first formed, or when a new partner is taken into an existing firm, or when two firms amalgamate into one, some agreement is generally come to by which what was before the property of some one or more only of the members of the firm becomes the joint property of all such members. All such agreements, if *bona fide*, and not fraudulent against creditors, are valid, and have the effect of altering the equitable ownership in the property affected by them. (*z*)

In Ex parte Ruffin, (*a*) which is the leading case on this subject, Thomas Cooper, a brewer, took James Cooper into partnership. That partnership was afterwards dissolved by articles, by which the buildings, premises, stock in trade, debts and effects were assigned to James by Thomas, who retired. James afterwards became bankrupt, and, some of the partnership debts being unpaid, an attempt was made to have what had been the property of the partnership applied in liquidation of those debts. But it was held that such property was no *longer the joint property of the two partners, but had been converted into the separate property of James. [*337

Ex parte Williams (*b*) was a similar case, only that on the disso-

building, and the other partner, who had personal charge of the work, took the lumber and applied it to the partnership uses as needed, with the knowledge of the two former, and without objection, these facts are enough to prove a conversion of all the lumber so bought and delivered into partnership property. Person *v.* Wilson, 25 Minn. 189.

(*z*) Such an agreement is not a breach of a covenant not to assign without the consent of the lessor. See Corporation of Bristol *v.* Westcott, 12 Ch. D. 461; Varley *v.* Coppard, L. R., 7 C. P. 505.

(*a*) 6 Ves. 119. See, too, Ex parte Walker, 4 De G., F. & J. 509; Ex parte Sprague, 4 De G., M. & G. 866; Ex parte Clarkson, 4 Deac. & C. 56; Ex parte Gurney, 2 Mont., D. & D. 541; Ex parte Peake, 1 Madd. 346; Ex parte Fell, 10 Ves. 348.

(*b*) 11 Ves. 3. Compare Ex parte Cooper, 1 Mont., D. & D. 358.

lution no assignment was made. There was not even any written agreement showing the terms on which the dissolution took place. But it was sworn that the partner who continued the business was to take all the stock and effects of the old firm, and it was held that they had become his separate property, and could not be considered as the joint property of the dissolved partnership.

These decisions have always been regarded as settling the law upon the subject of conversion of partnership property, and have been constantly followed. They were not, it will be observed, decided with reference to the doctrine of reputed ownership, but with reference only to the real agreement come to between the partners. They apply as much to cases of a change of interest on death as on retirement. (*c*)

The case of Ex parte Owen, (*d*) which has been already referred to, (*e*) shows that similar principles must be applied in order to determine what, on the formation of a partnership, has been converted from separate into joint estate. (*f*)[15]

Agreement must be executed.—In order, however, that an agreement may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed, and not be executory merely. In Ex parte Wheeler, (*g*) a retiring partner and a continuing partner entered into an agreement in writing, by which the re-

(*c*) See Re Simpson, 9 Ch. 572; and compare Ex parte Morley, 8 Ch. 1026, and Ex parte The Manchester Bank, 12 Ch. D. 917, and 13 Id. 465. These three cases turned on the construction of the partnership articles, combined in the last two with the wills of the deceased partners. The wills and the articles together prevented a conversion.

(*d*) De G. & S. 351.

(*e*) *Ante* p. *329.

(*f*) See, too, Ex parte Barrow, 2 Rose 252; and Belcher *v.* Sikes, 8 Barn. & C. 185, for a case where separate estate was made joint by a deed of dissolution not clearly expressed.

15. **Change of property on change of firm.**—While it is generally true that when a firm ceases the partners become tenants in common of the partnership property then undisposed of, yet it is not universally true. So long as partnership debts remain unpaid, partnership property continues such, for the purpose of application to the payment of such debts. Rice *v.* McMartin, 39 Conn. 573.

Where partners own each in severalty the real estate where the business is carried on, and buildings have been erected and improvements made thereon by the firm, the lands, on a dissolution, will be treated as partnership assets. Smith *v.* Danvers, 5 Sandf. (N. Y.) 669.

(*g*) Buck 25. See, too, Ex parte Wood, 10 Ch. D. 554; Ex parte Cooper, 1 Mont., D. & D. 358; and the case of

*338] tiring *partner assigned the stock, good will, lease, furniture, fixtures, books and debts of the firm, to the continuing partner, and the latter agreed to pay certain debts of the partnership, for which his father, he said, would be security. The father, however, refused to give any security, and this further act was necessary to be done in order to complete the transfer of the property. The continuing partner having become bankrupt, the court held that the property of the old firm had not been converted into the separate estate of the continuing partner, the agreement being still executory when the bankruptcy occurred.[16]

Effect of fraud.—Moreover, an agreement which can be successfully impeached for fraud will not affect the property to which it may relate;(*h*) and it must not be forgotten that in the event of

the Bank of England, 3 De G., F. & J. 645, noticed *ante* p.*330; and compare Ex parte Gibson, 2 Mont. & A. 4; Ex parte Sprague, 4 De G., M. & G. 866; Hawkins *v.* Hawkins, 4 Jur. (N. S.) 1044.

16. **Agreement must be executed.**—A note may be endorsed to a firm of which the endorser is a member in the same manner, and with the same effect as if he were not a member of such firm. Allen *v.* Mason, 17 Ill. App. 318.

Under articles of partnership between A and B, providing that either party could dissolve the partnership upon sixty days' notice in writing, B gave notice, and after the time limited, the parties agreed upon terms of dissolution and a division of the property. By this agreement B was indebted to A, which indebtedness was to be secured to A by mortgage. The agreement was to be reduced to writing and signed by both parties. B, however, refused to sign the agreement when written, or to give the mortgage. The property which was to belong to each was put in separate drawers in a safe, and each partner had a key of the drawer in which his part was put. *Held*, that the agreement was not obligatory on A, and had no efficacy to divide the partnership property. Fitzgerald *v.* Christt, 5 C. E. Gr. (N. J.) 90.

With a view to a dissolution, two partners agreed to divide their stock, and that the machinery which belonged to them should be given to the party who would give the most for it. They accordingly separated the stock into "two piles," but no delivery was made, and before the arrangement was completed the parties quarreled, and the settlement was interrupted. One of the parties caused a demand to be made for half of the property. *Held*, that enough had not been done to vest in the plaintiff a separate, exclusive property in the subject of the suit. Koningsburg *v.* Launitz, 1 E. D. Smith (N. Y.) 215.

Until a partnership concern is closed by a final account, the joint interest in the whole property remains; and if one partner takes out what he deems his share, and the residue is afterwards lost, he will be compelled to account with the other partners for their shares of the amount drawn out by him. Allison *v.* Davidson, 2 Dev. (N. C.) Eq. 79.

(*h*) Ex parte Rowlandson, 1 Rose 416.

bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them, agreements by which the bankrupt himself would have been bound. (*i*) In a case where both the partnership and the individual partners were insolvent, an agreement by one of them transferring his interest to the others, and thereby converting what was joint estate into the separate estate of the transferee, was held invalid; for, although no fraud may have been intended, the necessary effect of the arrangement was to delay and defeat the joint creditors. (*k*) The firm became bankrupt shortly after the assignment was made.

(*i*) See Re Kemptner, 8 Eq. 286; Anderson *v.* Maltby, 2 Ves. Jr. 244; Billiter *v.* Young, 6 El. & B. 40.

(*k*) Ex parte Mayou, 4 De G., J. & S. 664; Ex parte Walker, 4 De G., F. & J. 509. See, also, Luff *v.* Horner, 3 Fost. & F. 480, which seems to have been a clear case of fraud upon a creditor.

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